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THE
LAW OF MORTGAGES
OF
REAL AND PERSONAL PROPERTY.

BY
FRANCIS HILLIARD,
AUTHOR OF "THE LAW OF TORTS," ETC. ETC.

"The case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the Courts of Law." — CHANCELLOR KENT.

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THE LAW OF MORTGAGES.

CHAPTER XXV.

FORECLOSURE. FORECLOSURE BY LAPSE OF TIME. EXTINGUISHMENT OF THE RIGHT OF REDEMPTION BY THE SAME CAUSE.

1. Definition of foreclosure.
2. Foreclosure and redemption are reciprocal or mutual rights.

3. Extinguishment of the rights of mortgagee or mortgagor by lapse of time.

12. Statute of limitations, whether applicable as such.

17. What circumstances will prevent such extinguishment by lapse of time; disabilities, payments, acknowledgments, &c.

25. Whether the debt secured by mortgage is thereby saved from the statute of limitations: the debt may be barred, and the mortgage remain good.

1. THE subject of *foreclosure* has been so often incidentally alluded to in the preceding chapters, and indeed makes so inseparable a part of every title of the law of mortgages: that no other formal definition of it seems to be necessary. in commencing the particular consideration of this somewhat extensive topic, than to say: that foreclosure is the process by which a mortgagee himself acquires, or transfers to a purchaser, an absolute title to the property, of which he has previously been only the conditional owner, or upon which he has previously had a mere lien or incumbrance. This, however, is only a general definition. In a late case in Connecticut, the legal effect of a foreclosure is precisely defined. The question arose, whether by foreclosure of a prior mortgage the mortgagee acquired the mortgagor's right to redeem a subsequent mortgage. It was held that he did not. The Court remark: "We familiarly say, that a fore-

closure invests the petitioner with the interest of the party foreclosed; but we thus describe a practical effect rather than state what is absolutely true. As between the two parties to the bill, such a proceeding passes the mortgagor's title as effectually as a judicial sale, because it extinguishes all the title he had. All, however, that is formally done is the extinguishment of the right, the interposition of a perpetual legal bar against the party foreclosed. Such is the plain, literal meaning of the terms used. The decree only professes to close a door, which equity before had kept open; not to confer a right or pass a title. The foreclosing creditor succeeds therefore to nothing, acquires no estate, and purchases no right."¹ It is further remarked by the Court, in confirmation of the point decided, that the foreclosure, in reference to the second mortgagee, is *res inter alios*; that his rights are like those of the assignee of a *chose in action*; and that the first mortgagee acquires no title by *subrogation*, having paid nothing for his foreclosure. (a)

2. In general, the respective rights of mortgagee and mortgagor, with regard to foreclosure on the one hand, and redemption on the other, are treated as *mutual*; that is, the existence of the former is held to involve that of the latter, and *vice versa*; and the fact, that the one cannot legally be enforced under the circumstances, is regarded as sufficient to preclude a claim for the other. (b) It is said,² "the right to

¹ Per Storrs, C. J., *Goodman v. White*, 26 Conn. 322.

² Per Robertson, C. J., *Caufman v. Sayre*, 2 B. Mon. 206.

(a) Any contract made by the mortgagor cannot be set up by the mortgagee or the purchaser on foreclosure against the party contracting with the mortgagor, any more than it could be set up by such contractor with the mortgagor against the mortgagee on foreclosure. Thus, when a mortgagor of a lot, being about to build a house on it, agrees with the owner of an adjoining lot, that one half of the party wall shall be built on each lot, and the owner of the adjoining lot shall pay for the half on his lot when he shall use it; neither the mortgagee nor the purchaser on the foreclosure can recover the value of the half on the adjoining lot. *Thompson v. Somerville*, 16 Barb. 469.

(b) In a late case in Maine, (*Chick v. Rollins*, 44 Maine, 104,) the some-

foreclose and the right to redeem are reciprocal and commensurable." So it has been held, that, where the right of redemption was expressly restricted to the life of the mortgagor, inasmuch as the mortgagee would not be permitted to foreclose during his life, on the other hand, the heir should not redeem after his death.¹ (c) So, in general, upon a bill to foreclose and a bill to redeem, the terms of redemption, for the defendant in the one case, and the plaintiff in the other, are the same.² But where the deed provided, that, on payment of the principal-money in a certain year, the estate should be redeemed or reconveyed, it was held, that, although before that time the mortgagee could not have foreclosed, still the mortgagor might redeem.³

3. The *mutuality* of these respective rights may be further illustrated, by considering the legal effect of *limitation* or *lapse of time* upon the title of a mortgagor or mortgagee, who has been deprived of the possession of the land for a certain period. Where the mortgagee has had possession for a certain length of time, it is at some times said, the mort-

¹ Bonham v. Newcomb, 2 Vent. 364;
1 Pow. 127 a.

² Du Vigier v. Lee, 2 Hare, 326.
³ Talbot v. Braddil, 1 Vern. 394.

what singular state of facts existed, which gave rise to the following remarks of the Court: — "It is contended on the part of the complainant, that an indefeasible title had been obtained under the mortgage by a possession for more than twenty years, without any claim made under the mortgagor. On the other hand, it is insisted, that the same length of time having elapsed since the maturity of the notes, they are presumed to have been paid, and the mortgage extinguished; and in confirmation of this presumption, the non-production of the notes by the complainant is relied upon." It was decided, however, that the complainant was entitled to judgment, either as mortgagee or absolute owner. Per Tenney, C. J., Ibid. 115.

(c) This, however, was only one of the reasons for denying the right of redemption. To refuse it for this cause alone would probably be inconsistent with the general doctrine as to limiting the redemption of mortgages. (See ch. 4.)

It is said, foreclosure must be of *the whole* of the mortgaged premises. If the mortgagor can redeem any part, he may redeem all. Spring v. Haines, 8 Shepl. 126.

gage is *foreclosed* by entry and possession of the mortgagee, and, at others, the mortgagor *cannot redeem*, after being so long deprived of the possession; which are but equivalent modes of expressing the same legal proposition. So, on the other hand, long-continued possession of the mortgagor may be said either to give him an *absolute title* to the land, or to *extinguish the mortgage* and bar the mortgagee's right of action thereupon. Thus in American cases we find the following language: "The mortgagee's possession is just as consistent with the mortgagor's title, as is the possession of the latter with the title and interest of the mortgagee; one as well as the other may in time ripen into a valid hostile title, but the intermediate possession cannot be deemed adverse, so far as to defeat or impair transfers of the existing title of the party out of possession. A mortgagee may work a disseisin, but I apprehend within the period requisite for barring redemption, that can only be done by some direct, open, and unequivocal act, in hostility to the title of the mortgagor."¹ So, in another case: "In the case of a mortgagor coming to redeem, that court (equity) has, by analogy to the statute of limitations, which takes away the right of the plaintiff, after twenty years' adverse possession, fixed upon that as the period, after forfeiture, and possession taken by the mortgagee, no interest having been paid in the mean time, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored. In respect to the mortgagee, who is seeking to foreclose the equity of redemption, the general rule is, that where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged, by payment of the money, or a release, unless circumstances can be shown sufficiently strong to repel the presumption, as payment of interest, a promise to pay, an acknowledgment by the mortgagor, that the mortgage is still existing, and the like."² And, in

¹ *Borst v. Boyd*, 3 Sandf. Ch. 507, 508.

² *Per Washington, J., Hughes v. Edwards*, 9 Wheat. 497, 498.

regard to a *purchaser from the mortgagor*: “A purchaser, with notice, can be in no better situation than the person from whom he derives his title, and is bound by the same equity which would affect his rights. The mortgagor, after forfeiture, has no title at law, and none in equity, but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice passes nothing but an equity of redemption, and the latter can, no more than the mortgagor, assert that equity against the mortgagee, without paying the debt, or showing that it has been paid or released, or that there are circumstances in the case sufficient to warrant the presumption of those facts, or one of them.”¹

4. For these reasons, before considering the express statutory provisions of the several States, in relation to foreclosure and redemption, which are very numerous and varied, we may most conveniently state together the general rules of law and equity upon these subjects, independent of any positive regulation. It will be seen, that, although statutes have been passed in England, which to a certain extent limit the claims of mortgagor or mortgagee, as well as other titles to real property, within a specified period of time; yet the prevailing doctrine upon the subject has for the most part grown up, independently of any statutory provision. Thus in the early case of *White v. Ewer*,² “at a rehearing before my Lord Keeper, assisted with Justices Vaughan and Turner, concerning redemption of a mortgage made more than forty years since; the Lord Keeper declared that he would not relieve mortgages after twenty years; for that the statute of 21 Jac. ch. 16, did adjudge it reasonable to limit the time of one’s entry to that number of years; unless there are such particular circumstances as may vary the ordinary case, as infants, feme coverts, &c., are provided for in the very statute; the matters in equity *are to be governed by the course of the Court*, and that ’t is best to square the rules of equity,

¹ Per Washington, J., *Hughes v. Edwards*, 9 Wheat. 499.

² 2 Vent. 340; *Robinson v. Fife*, 3 Ohio, N. S. 551.

as near the rules of law and reason as may be." (*d*) Accordingly it is held, that the same period, which bars an action at law, also bars a bill in equity, for foreclosure or redemption. Thus, in Vermont and Connecticut, fifteen years, unless equitable circumstances take the case out of the rule.¹ So minor heirs will be barred of their equity of redemption by fifteen years' adverse possession, unless they petition within five years after they come of age.² So in Ohio, twenty-one years' adverse possession of the mortgagee bars the right of redemption.³ And, in Illinois, in case of a loan with a deed of land for security, the title is in trust for the grantor in the nature of a mortgage, and no lapse of time short of that fixed by the statute of limitations can forfeit the right of redemption.⁴ So the time fixed in a statute as a bar to redemption of an express mortgage, which specifies a day of forfeiture, must also be applied to a right of redemption arising by construction of equity; and the time must be reckoned from the accruing of the right to sue.⁵

5. With reference to the rights of the mortgagee, as affected by lapse of time, it is said, mere delay of a mortgagee to enforce his claim is not fraudulent on his part, nor does it affect his title.⁶ Thus a mortgage was made in 1809 and recorded. The mortgagor having transferred his estate, the mortgagee never gave notice to the purchaser of his mortgage, but in 1821 brought a suit for the land. Held, he was entitled to recover.⁷ (*e*)

¹ Crittendon v. Brainard, 2 Root, 485; Martin v. Bowker, 19 Verm. 526; acc. McDonald v. Simes, 3 Kelly, 383; Field v. Wilson, 6 B. Mon. 479; Gunn v. Brantley, 21 Ala. 633; Richmond v. Aiken, 25 Verm. 324; Merriam v. Barton, 14 Verm. 501; Skinner v. Smith, 1 Day, 124; Haskell v. Bailey, 22 Conn. 569.

² Sheldon v. Bird, 2 Root, 509.

³ Robinson v. Fife, 3 Ohio, N. S. 551.

⁴ Coates v. Woodworth, 13 Ill. 654.

⁵ Bailey v. Carter, 7 Ired. Eq. 282.

⁶ Davis v. Evans, 5 Ired. 525.

⁷ Dick v. Baleh, 8 Pet. 30.

(*d*) Crittendon v. Brainard, 2 Root, 485.

(*e*) In Ashton v. Milne, 6 Sim. 378, 379, Shadwell, V. C., gives the following view of the course of decisions upon this subject: — "This rule is in a great degree established by Cholmondeley v. Clinton, and the cases which

6. But it seems to be the established rule, both in law and equity, as laid down by Chancellor Kent,¹ that a mortgage is not evidence of a subsisting title or interest in the mortgagee, if he has never entered under the mortgage, and there has been no interest paid, or demand thereof made for twenty years. And in *Dunham v. Minard*,² where the land had been held for twenty-five years without claim by the mortgagee, the Chancellor remarked: "The only reasonable conclusion which can be drawn from the facts in this case is, that these mortgages, if they were ever justly due, must have been paid and satisfied by the mortgagor." So Sir Thomas Plumer, M. R., says:³ "I cannot accede to the doctrine, that no

¹ *Giles v. Baremore*, 5 Johns. Ch. 552; *Boyd v. Harris*, 2 Md. Ch. 210; *W. 235*. See *Evans v. Huffman*, 1 Moreau v. Detchemendy, 18 Mis. 522. *Halst. Ch. 354*.

² 4 Paige, 443; acc. 1 B. Mon. 309.

are reported to have been cited on the appeal to the House of Lords. The case of *Price v. Copner*, 1 Sim. & St. 347, has been cited as infringing the rule. But that case seems to me to afford the strongest evidence of the rule; for, by the decree on the hearing, it was referred to the Master to inquire whether the defendants, or those under whom they claimed, had in any way treated their title as a mortgage title at any time within twenty years before the filing of the bill. It is clear that the reference could only have been made in order to ascertain whether the defendants had placed themselves without the benefits of the rule. That case, therefore, is confirmation of the rule. The same volume which contains the report of *Price v. Copner*, contains also a report of *Harrison v. Hollins*. It appears, by my note of that case, that Sir William Grant in his judgment cited a case of *Dallas v. Floyd*, which was heard in 1739. There, a tenant for life of an equity of redemption permitted the mortgagee to enter into possession. The tenant for life died in 1721, and in 1737, which was more than twenty years after the mortgagee's entry into possession, the remainder-man filed his bill to redeem; and it was dismissed with costs. Therefore this rule has prevailed, uniformly, except in the case of *Corbett v. Barker*. In that case, there was a decision by Eyre, Chief Baron, and a renewal of that decision by Macdonald, Chief Baron. There is great force in the argument of Sir Samuel Romilly, and I cannot but think that the better decision was reversed. I am not, however, left to choose between the conflicting decisions of those learned Judges, because I take the rule to be established."

length of time will operate against a mortgagee who has been out of possession without claim or acknowledgment. The argument from there being a tenancy at will arises from a mere fiction. The relation of mortgagor and mortgagee is peculiar; the tacit agreement is, that he is to be the owner if he pays. Then what is to be the effect of one person's continuing for twenty years in possession of the estate of another, who does nothing to make good his title, and to keep alive the relation of mortgagor and mortgagee? If twenty years' possession, without claim on the part of the mortgagee, will not operate as a defence against him, I do not see how any period of time, however long, can bar him. With respect to the mortgagor, it is clear that his equity is shut out by the mortgagee being in possession for twenty years without acknowledgment; then why should not this be reciprocal?" The same Judge remarks: "There are two ways in which length of time may operate in cases like this, when it is not a positive bar by virtue of the statute; namely, by raising a presumption, either that the debt demanded never was due, or that it has been paid."¹ Accordingly, a bill by a mortgagee, for a sale under a trust for that purpose in the mortgage, was dismissed, upon doubtful evidence of title, and possession of the mortgagor for twenty years, without payment of interest, demand, or acknowledgment.² And Prof. Greenleaf remarks, that the supposed relation of the mortgagor to the mortgagee, as his tenant, is not allowed to operate against the presumption of payment arising from the mortgagor's continued possession. After twenty years, this presumption may be made, even in chancery.³ So it is remarked by the Court in Massachusetts: "A question has been sometimes raised, whether the doctrine of presumption, arising from the lapse of time and total neglect to take any measure to enforce a claim, could properly be applied to the case of a mortgage

¹ *Christophers v. Sparke*, 2 Jac. & W. 233. *gan v. Davis*, 2 Har. & McH. 18; *Cooke v. Soltan*, 2 Sim. & S. 154;

² *Ibid.* 223.

³ 2 Greenl. Cruise, 119, n. See *Bennett v. Cooper*, 9 Beav. 252. *Borst v. Boyd*, 3 Sandf. Ch. 501; *Mor-*

of real estate ; and in some of the earlier English cases, the doctrine was advanced, that the common-law presumption applicable to bonds, judgments, &c., arising from a delay of twenty years to enforce the same, did not apply in the case of a mortgage, as in such cases the legal estate was in the mortgagee, and the mortgagor was a mere tenant at will, and his possession was therefore the possession of the mortgagee.^(f) But this doctrine was repudiated by Lord Thurlow in the case of *Trash v. White*,¹ and by the Master of the Rolls in *Christophers v. Sparke*,² in very strong language ; and the cases of debts secured by mortgages are placed on the same footing with other demands, and held liable to be defeated by the same presumption, arising from lapse of time and laches of the mortgagee.”³

7. Upon these grounds, the mortgagor and his heir having successively occupied the premises, and neither the mortgagees nor any persons under them entered for condition broken or otherwise, for more than twenty years from the time the mortgage debt became due ; these circumstances were held to raise a presumption in fact, liable to be controlled by other evidence, that the debt had been paid, and to constitute a good defence to an action upon the mortgage.⁴ So it has been held, that a mortgage, made to secure a title to land sold and conveyed, will be presumed to be extinguished after a lapse of from thirty to fifty-six years, and the enjoyment of the land under the title conveyed.⁵ And

¹ 3 Bro. C. C. 289.

⁴ Ibid. 26.

² 2 Jac. & Walk. 223.

⁵ *Murray v. Fishback*, 5 B. Mon.

³ Per Dewey, J., *Howland v. Shurt-* 403.
leff, 2 Met. 27.

(f) In the case of *Noyes v. Sturdivant*, 6 Shepl. 104, which was ejectment against an execution purchaser of the equity, it seems to have been admitted that more than twenty years had elapsed between the giving of the mortgage and the commencement of suit. But the Court say (Ibid. 105) : “The second objection is, that the plaintiff did not prove a seisin within twenty years. The possession of the mortgagor and of his tenant, is the possession of the mortgagee.”

it was held, that, although payment of the mortgage debt was not proved, yet, no possession being shown in the mortgagee or those claiming under him from the time of making the mortgage to the commencement of suit, nor any payment made on the mortgage for more than twenty years prior to the same period, there was no such title in the mortgagee as would bar an ejectment for the land. And it was further held, that these facts constituted evidence, from which a jury might infer a release of the mortgage, if necessary.¹ So the defendant had agreed to purchase of the plaintiff some houses in London, but refused to complete his purchase, because it did not appear by the abstract that an old mortgage had been paid off, or the legal estate reconveyed. This suit was accordingly instituted about eighty years after the date of the mortgage, to compel a specific performance of the agreement; and the question was, whether, under the circumstances of the case, payment and reconveyance ought to be presumed. No mention of the mortgage was made in subsequent title-deeds; for several years neither principal nor interest had been demanded; the mortgage deeds had been long in the possession of the owner and his ancestors; and it did not appear that any administration had been taken upon the mortgagee's estate. Held, under these circumstances, a reconveyance of the estate should be presumed.² So a mortgage sixty years old, though unsatisfied of record, may be presumed paid, and it is no incumbrance to the title, the mortgagor being in possession of the estate, and there being no evidence of its non-payment.³

8. On the other hand, corresponding rules have been adopted, as to the effect of lapse of time upon the rights of the mortgagor. It is said by an English Judge in a late case, "It is a settled rule, that a court of equity regards more the antiquity of possession by the defendant, than the novel acquirer of title to the plaintiff; and that it will not interfere against a person who, claiming by a mortgage title, has been

¹ *Morgan v. Davis*, 2 H. & McH.
18.

² *Cooke v. Soltan*, 2 Sim. & St. 154.

³ *Belmont v. O'Brien*, 2 Kern. 394.

in possession more than twenty years without having recognized the right to redeem.”¹ (g) So Judge Story says:² “The ordinary limitation of the right of redemption is twenty years from the time of taking possession after condition broken. During this period, the mortgagee is liable to account, and, if payment be tendered to him, to become a trustee of the mortgagor. If the mortgagee holds twenty years, without accounting or admitting that he is merely a mortgagee, his title becomes absolute in equity, as it was before at law. If the time of limitation once begins to run, and no subsequent admission is made by the mortgagee; it continues to run against all claiming under the mortgagor, whatever their disabilities may be. The bar arising from twenty years’ possession is not positive, but, being founded upon a presumption of payment, is open to be rebutted by circumstances.” So it is said in Kentucky:³ “A possession for twenty years by a mortgagee will *per se* create a legal presumption that the equity of redemption has been released, and that the possession, which in its origin was amicable, had been adverse during the entire duration of it, or for twenty years. So a mortgage was made in 1639. In 1649, the mortgagee entered for breach of condition. In 1663, an heir of the mortgagor brings a bill to redeem. After his death, the suit was revived by his co-heirs, who obtained a decree in 1672, but did not prosecute it. The plaintiff, having purchased the equity of redemption from the heirs, brings this bill to obtain the benefit of the former decree. Held,

¹ Per V. C. Shadwell, *Ashton v. Milne*, 6 Sim. 378. See *Pickens v. Walker*, 3 Dana, 167.

² 2 Story’s Eq. 1028, *a, b*; *Ayres v. Waite*, 10 Cush. 72. See *Christophers v. Sparke*, (h) 2 Jac. & W. 235; *Morgan v. Morgan*, 10 Geo. 297; 2 Meri. 171; *Slee v. Manhattan, &c.* 1 Paige,

56; *Wood v. Jones*, Meigs, 518; *Bond v. Hopkins*, 1 Sch. & Lef. 429; *Hughes v. Edwards*, 9 Wheat. 489; *Blethen v. Dwnal*, 35 Maine, 556; *Haskell v. Bailey*, 22 Conn. 569; *Hurd v. Coleman*, 42 Maine, 182.

³ Per Robertson, C. J., *Gates v. Jacob*, 1 B. Mon. 309.

(g) Great increase of value will not affect the title of a mortgagee, arising from twenty years’ possession. *Cromwell v. Bank, &c.* 2 Wallace, Jr. 569.

(h) A very leading case upon this subject.

the bill should be dismissed, by reason of the difficulty of the account after such great length of time ; and although there were infants, yet the time having begun upon the ancestor, it should run against them, as in the case of a fine. The Lord Keeper adds : “ Although they afterwards obtained a decree, yet not having prosecuted it, and the cause being now within one year of the *Grand Climacterick*, it is fit it should rest in peace.”¹ So, on demurrer to a bill to redeem a stale mortgage, where the mortgagee appeared by the bill to have been in possession above twenty years ; the Court held the defendant need not plead the length of time, but might demur ; and that no redemption should be allowed in such case, unless there was an excuse by reason of imprisonment, infancy, or coverture, or by having been beyond the sea, and not by having absconded, which is an avoiding or retarding of justice.² (i) So, where the plaintiff claimed redemption of certain lands, and the defendant insisted on the antiquity of the mortgage, and that, by reason of long leases existing at the time of the mortgage, he could derive no benefit from the mortgage till they expired ; the Lord Chancellor dismissed the bill. Upon a rehearing, it appeared that the plaintiff mortgaged the premises, worth £200 per annum, to the defendant’s father, for £250, and the plaintiff agreed and accordingly sealed a deed for the absolute purchase of the premises to the defendant’s father, if the £250 were not paid at the end of seven years.³ So, in a recent case, *bonâ fide* purchasers from a mortgagee had been in uninterrupted possession for eighteen years, and made valuable improvements ; the mortgagee, when he sold, had been in visible possession ten years ; the mortgage had been forfeited by breach of condition nine years ; the mortgagor had been dead four years,

¹ *St. John v. Turner*, 2 Vern. 418, 419.

³ *Bowen v. Edwards*, 2 Rep. in Cha. 221.

² *Jenner v. Tracy*, 3 P. Wms. 287, n.

(i) In *Edsell v. Buchanan*, (in Cha. 11 Mar. 1793,) the Lord Chancellor expressed a doubt whether such defence was a proper ground of demurrer.

and his estate was at the time hopelessly insolvent, though it afterwards became solvent. The mortgagee was administrator of his estate, and subsequently himself died. It was held, under these circumstances, that the right of redemption was gone.¹ So in case of a conveyance, with a bond to reconvey, on payment of a certain sum, in one year; on a bill filed by the grantor thirty-eight years afterwards, for a reconveyance, held, the bill could not be maintained.² So, though the complainant, nineteen years before, had presented the claim in a cross-bill, in another suit between the parties, which was never prosecuted by the complainant, and suffered to be dismissed; and especially as it varied entirely from the facts admitted in the answer to the cross-bill.³ (*j*)

¹ *Dexter v. Arnold*, 1 Sumn. 109.

² *Farrow v. Farrow*, 6 B. Mon. 482.

³ *Ibid.*

(*j*) James Ashton and wife were seised in fee, in her right, of an undivided moiety of certain land, and Samuel Ashton and wife, in her right, of another undivided fourth. James Eyre owned the other moiety,* and the whole was subject to a mortgage term of one thousand years. In 1784, all these parties professed to convey to Milne, under whom the defendants claimed. In 1793, James died. His wife survived and married again. She survived her second husband, and died in 1825, and James Ashton, one of the plaintiffs, was her son. Frances, wife of Samuel, died in 1818, and her husband in 1826. Samuel, the other plaintiff, was her son. In 1831, the plaintiffs filed a bill to redeem. Held, it could not be maintained. *Ashton v. Milne*. 6 Sim. 369.

In a bill in equity to redeem brought against the heirs of a mortgagee, the plaintiffs claimed, as executors and heirs of the last surviving trustee, under a deed of trust from the mortgagor, made more than thirty years before, for the benefit of creditors and the payment of debts. The deed did not mention the mortgaged estate, although it specified other real property of the grantors; but contained a general grant of all their joint and several estates. The object of the trust did not extend to the payment of debts secured by mortgage; and it was expressly provided, that, if the debts could be satisfied by sale of a part only of the premises thereby granted, the trustees should reconvey the residue. It was held, that the claim of a right to execute the trust, without showing that debts remained unpaid, was against the spirit and intention of the provision last stated; that, if all the debts were paid, the

* This is the language of the Court.

10. It has been held, that unexplained possession of mortgaged premises, for less than twenty years, by the mortgagor, may be left to the jury, in connection with partial payments and other evidence, as tending to show that the debt was fully paid.¹ But, in *Cook v. Arnham*,² the Lord Chancellor said, that a length of time which will not bar an ejectment cannot bar a bill in equity. And in another case,³ Lord Hardwicke held the period of fifteen years no bar to redemption. So, in *Moore v. Cable*,⁴ Chancellor Kent remarked, with regard to the effect of mere *constructive* possession: "Nor will a mere constructive possession for twenty years be sufficient. The Courts require an actual possession by the mortgagee during the period that is to form the equitable bar. The idea, that as the mortgaged premises were probably wild, uncleared lands, possession is to be deemed to have followed the right, and to have been in the mortgagee after default of payment, is not applicable to this case. That fiction was adopted by the Courts to preserve the lands of the true owner, while in their uncultivated state, from intrusion and trespass; and it would be a perversion of the rule to make it operate by way of extinguishment of a right. Nothing short of actual possession for twenty years, will at law toll the entry of the true owner; and the equity of redemption ought to be equally protected."

11. A statute of Rhode Island authorized *the Supreme Court of the State* to allow redemption of any mortgaged

¹ *Gould v. White*, 6 Fost. 178.

² 3 P. Wms. 283.

³ 3 Atk. 313.

⁴ 1 Johns. Ch. 387.

trustees were bound to reconvey, and equity would presume that done which ought to have been done; that if the trust had been executed without resorting to the mortgaged lands, they fell under the residuary part, which, the deed itself showed, did not belong to the trustees or their heirs; that the lapse of time was of itself amply sufficient to warrant the presumption of an execution of the trust; and that the suit could not be maintained. *Grant v. Duane*, 9 Johns. 591, (decision of the Court of Errors unanimously reversing that of the Chancellor.)

estate after twenty years' possession, if peculiar circumstances should render it equitable. In *Dexter v. Arnold*,¹ it was held that *the Circuit Court of the United States* should be governed by this statute, though specially addressed to the State Court; first, because it furnished the appropriate analogy upon the known doctrine of courts of equity; and second, because it was but a mere affirmation of the general principles, upon which courts of equity act in allowing or refusing a redemption.

12. As has been already stated, (*supra*, sec. 4,) the effect of long-continued possession, upon the rights of mortgagee or mortgagor, has been usually made to depend rather upon general principles or analogies, than upon any express statute of limitation. Whether a statute of limitation, as such, can be relied on by way of formal plea, seems to be a point involved in some confusion. (*k*)

¹ 3 Sumn. 152.

(*k*) Stat. 3 & 4 Wm. IV., c. 27, provided, that the same lapse of time should bar suits in equity for real property, as at law. Under this act, it was held that the mortgagee might plead the statute of limitations in bar of the right to redeem, or might demur. If he demurred, the plaintiff might show special circumstances on the face of the bill for overruling the demurrer; and, if he pleaded, the plaintiff might reply to the plea, amend, or prove himself within the exceptions. *Aggas v. Pickerell*, 3 Atk. 225; *Hadle v. Healey*, 7 Ves. & B. 536; *Coote*, 595.

By Stat. 7 Wm. IV., & 1 Vict. c. 28, a mortgagee may enter on, or bring a suit at law or in equity for the land, at any time within twenty years after the last payment of principal or interest, although more than twenty years may have passed since the right of entry or action accrued. By the same statutes, when the mortgagee has obtained possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor or any one claiming under him shall not bring a suit to redeem, after twenty years from the obtaining of such possession or receipt; unless in the mean time an acknowledgment of the mortgagor's title or right of redemption have been given to the mortgagor or some one claiming his estate, or the agent of such party, in writing, signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought, but within twenty years next after the time when such acknowl-

13. The general doctrine is sometimes laid down, applicable alike to both the parties to a mortgage, that the relation between mortgagor and mortgagee is so far analogous to that of trustee and cestui, that the possession of either party

edgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agents, shall be as effectual, as if given to all; but in case of more than one mortgagee or more than one person claiming under him, such acknowledgment shall bind only the party actually signing it, those claiming under him, or claiming an estate after his interest is terminated; and where the party giving such acknowledgment is entitled to a divided part of the property, and not to any ascertained part of the mortgage money, the mortgagor may redeem such divided part on payment with interest of that part of the mortgage money, which shall bear the same proportion to the whole, as the value of such divided part of the property bears to the whole. See 1 Steph. 284.

To prevent the lapse of time from affecting the validity of a mortgage, its *execution* within twenty years, if it contain a covenant admitting the mortgagee's title, is a sufficient acknowledgment of the title, under St. 3 & 4 Wm. IV., c. 27, § 14, although it bear date nearly a year previous to the execution. *Jaynes v. Hughes*, 28 Eng. Law & Eq. 589.

Another section of the statute last named imposes certain limitations upon the rights of mortgagees. Under this section it has been held, that the mortgagee, in a mortgage containing no covenant to repay the money borrowed, may recover the principal within twenty years, but his remedy for arrears of interest is limited to six years. The language of the act is, that no suit shall be brought to recover money secured by mortgage, but within twenty years, &c.; and no arrears of interest in respect of any money charged upon land shall be recovered but within six years. *Hodges v. Croydon*, &c., 3 Beav. 86.

But where the mortgage debt and interest are secured by a bond or covenant, the mortgagee may maintain a foreclosure suit to charge the estate with the full arrears of interest, accruing within twenty years. *Du Vigier v. Lee*, 2 Hare, 326.

It has been held, that, where no interest has been paid, the twenty years run from the execution of the deed, if under it the mortgagee is entitled to immediate possession. *Doe v. Lightfoot*, 8 Mees. & W. 564. Also, that a mortgagee brought before the Court as a *defendant* was not barred by the lapse of twenty years. *Murphy v. Sterne*, 1 Drn. & Walsh, 236. See 2 Smith's Lead. Cas. 409, note.

is as to the other not adverse, but amicable, unless the party in possession show an unequivocal intent to the contrary. Hence the statute of limitations does not run against the party out of possession. A mortgagor cannot disseise the mortgagee. So, even where the mortgagee attempts to convey an absolute title, this is no disseisin of the mortgagor, but passes merely a defeasible estate.¹ (*l*)

14. In reference to the rights of the mortgagee, arising from long-continued possession; in *Aggas v. Pickerell*,² the mortgagee and those claiming under him had been in possession at least thirty years. The plaintiff, by way of excuse for delay, alleged that the mortgagor was several years out of the kingdom, and died abroad. The defendant pleads the statute of limitations, and by his plea insists upon the length of time of the possession. The Lord Chancellor said: "The excuse the plaintiff makes is not sufficient, for the person who has a right to redeem should take notice of it at his peril. But I have great doubt with me, whether the defendant can in this case plead the statute of limitations, for insisting on the length of time against a bill to redeem, is only a kind of equitable bar, and taken by way of analogy to the statute of limitations." But upon further argument and consideration the plea was allowed.

15. But in this country it has been held, that the denial by the mortgagee of the right of the mortgagor to redeem is not sufficient to set up an adverse holding to the mortgagor,

¹ *Fenwick v. Macey*, 1 Dana, 279; *v. Ewer*, 2 Ventr. 340; *Morgan v. Morgan*, 10 Geo. 297.

² 3 Atk. 225.

(*l*) It is said, the time fixed in a statute, as a bar to redemption, in case of an express mortgage, specifying a day of forfeiture, must also be applied to a right of redemption arising by construction of a Court of Equity; and the time must be computed from the accruing of the right to sue. *Bailey v. Carter*, 7 Ired. Eq. 282.

In Iowa it is held, that, in an action to redeem, the statute of limitations applies, as in case of an ordinary action for possession. *Montgomery v. Chadwick*, 7 Clarke, 114.

so as to let in the statute, without showing that the mortgagor had *actual notice* of such adverse holding. As where the redemption money was tendered by an agent of the mortgagor to the mortgagee, who denied the right of the mortgagor to redeem.¹ So, in another case,² it was remarked: — “Whatever dicta gentlemen may find in some of the more modern English cases, which some have construed into a supposed authority in favor of the operation of the statute, and that the mortgagee in possession is in adversely to the mortgagor, we venture to assert that no such case has been so decided where the point was directly made. That time in the court of equity has been taken in analogy to the statute of limitations is admitted. But what is meant by this expression, in analogy to the statute? We do not understand by the terms used, that we are to take the same period which the statute has forged for the courts of law. All that is intended to be expressed is, that equity will interpose her rules as to periods within which she will act upon rights purely equitable. She will not enforce stale equities, but will rather, when great length of time has intervened, decline her interference, upon a presumption that if the claim had been well founded and had not been satisfied, it would have been presented earlier.” He afterwards proceeds to remark:³ “Before we go into the act, it is proper to look to the relation of mortgagor and mortgagee. In feudal times unlettered men used signs by which the relation of the tenant to his lord was manifested; he was found on the land with his badge or mark of fealty. If he cast off this and assumed another, it was a disseisin, and the landlord instantly had his remedy; and to this day a tenant, before the law will allow him to assume the character of a disseisor, must surrender and put an end to his relation to his landlord. The relation of mortgagor and mortgagee is just as strong. Nay, the law will not let the mortgagee, at his will,

¹ *Yarborough v. Newell*, 10 Yerg. 376.

² *Hammonds v. Hopkins*, 3 Yerg. 528.

³ 3 Yerg. 529.

put an end to the trust relation in which he stands to the mortgagor.” (*m*)

16. In reference to the rights of the mortgagor, arising from possession, it has been held in Massachusetts, that an action for the foreclosure of a mortgage, under the Revised Statutes, c. 107, is not barred by the statute of limitations, (Rev. Sts. c. 119,) unless the mortgagee has been disseised for twenty years by the mortgagor or one claiming under him. Thus a mortgage was made in 1805, and the mortgage delivered, and the note transferred, in 1806, and remained in the assignee's hands till 1838. The mortgagor paid the interest till 1827, and ten dollars on the mortgage in 1838. In 1841, the mortgagor, who had previously continued seised and possessed, conveyed to the tenant, having notice of the above facts but denying the validity of the mortgage. The mortgagor knew that the assignee of the note had the note and mortgage in his hands, and claimed to own them. The mortgage debt remained unpaid, with the exceptions above stated. Nearly forty years after execution of the mortgage, the administrator sues to foreclose. Held, the mortgagor was a mere tenant at will or sufferance, the mortgagee being seised and possessed of the premises, and the title of the former not *adverse* to that of the latter; and that the action should be maintained. The Court say: — “The statute can never bar an action for the foreclosure of a mortgage, unless the mortgagee had been disseised by the mortgagor or by

(*m*) So in another case in the same State it is said: “If the mortgagee's possession of the mortgaged slave for three years would bar the equity of redemption, he might sue the mortgagor at law and recover the money he had advanced upon the mortgage, and thus, by virtue of the contract, he would undoubtedly have a right to the money, and by virtue of the statute of limitations, a right to the negro. Nor would the mortgagor have any better ground to enjoin a recovery of the money, by alleging that his negro had become the property of the mortgagee by the statute of limitations, than a party who may be sued upon a bond would have to enjoin it, by alleging that he had an account against the plaintiff, which, though just, had been barred by the statute.” Per Green, J., *Wood v. Jones*, Meigs, 517, 518.

some person claiming under him. It is true that if the mortgagor should remain in possession for twenty years without paying interest or rent, or otherwise admitting that the mortgage debt was unpaid, this would be good presumptive proof of payment, and would be a good defence to an action for foreclosure. But it would not be a statute bar. In the present case there was no disseisin by the mortgagor or by the tenant until 1841, when the latter purchased the premises of the former, denying the validity of the mortgage. It is clear, therefore, that the action is not barred by the statute of limitations; and it being admitted that the mortgage debt has not been paid, the demandant is entitled to judgment."¹ But it is held in Connecticut, that a mortgagor need not plead the statute of limitations to a suit for foreclosure, after remaining in undisturbed possession fifteen years.²

17. The same *disabilities*, which prevent the operation of the statute of limitations in other cases, will also obviate the effect of a lapse of time upon the rights of mortgagor and mortgagee. It is held, that the right to redeem accrues when the debt is payable, unless the mortgagor is then out of the United States.³ And, on the other hand, if a party be not "without the limits of the United States at the time when the right of redemption first accrued," no subsequent absence will prevent the operation of the statute of limitations, or give him ten more years in which to make his entry; and the rule of equity is applied on the same principles as the statute.⁴ So, in case of a bill to redeem a mortgage made in 1642, it appeared that the mortgagee entered in 1650; and there were three descents on the defendant's part, and four on the part of the plaintiff. Yet the length of time being answered for the greatest part by infancy or coverture, and forasmuch as in 1686 a bill was brought by the mortgagee to foreclose, and an account then made up by the

¹ Bacon v. McIntire, 8 Met. 87.

² Haskell v. Bailey, 22 Conn. 569.

³ Phillips v. Sinclair, 20 Maine, 269.

⁴ Ibid.

mortgagee, the Court decreed a redemption, and an account from the foot of the account in 1686.¹

18. But where there was a conveyance by husband and wife, on condition, that if in three years they repaid a certain sum recited to be loaned by the grantee, the deed should be void; and that he should enter and take the profits in lieu of interest; and he entered accordingly, and remained in possession eighteen years: the right of redemption was held to be barred.²

19. A further qualification of the general rule upon this subject is thus stated by Judge Story:—"If the mortgagee enters, not in his character of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor, and the validity of the conveyance which he takes. So that, if the conveyance be such as gives him the estate of a tenant for life only in the equity of redemption, there, as he unites in himself the characters of mortgagor and mortgagee, he is bound to keep down the interest of the mortgage, like any other tenant for life, for the benefit of the persons entitled to the remainder; and time will not run against the remainder-man, during the continuance of the life estate."³ Thus, where a mortgagee remained in possession six years, without acknowledgment of the title of the mortgagor, bought out a tenant for life of the equity, and occupied twenty years more; held, during the tenancy for life his occupation was not adverse, and the reversioner might redeem.⁴ (n)

¹ *Procter v. Cowper*, 2 Vern. 377.
See 2 Vent. 340.

² 2 Story's Eq. § 1028 *a*. See *Palmer v. Eyre*, 6 Eng. Law & Eq. 355.

³ *Jarvis v. Woodruff*, 22 Conn. 548.

⁴ *Hyde v. Dallaway*, 2 Hare, 528.

(n) But in *Dallas v. Floyd*, (cited in 6 Sim. 379,) a tenant for life of an equity of redemption permitted the mortgagee to enter into possession. The tenant for life died in 1721, and in 1737, which was more than twenty years after the mortgagee's entry into possession, the remainder-man filed his bill to redeem; and it was dismissed with costs.

So, where A. devised a mortgaged estate to his widow for life, with power

20. Lapse of time does not bar the redemption of a *Welsh* mortgage.¹ Nor of a mortgage which provides that the mortgagee shall hold the estate till the debt is paid; unless, upon an account of the rents and profits, it appears that the mortgagee has had possession more than twenty years since such payment.² Nor where the mortgagee has had constant possession.³ Nor where the mortgagee by any act, more especially if deliberate, and whether immediately connected with the owner of the equity of redemption or not, recognizes the continued existence of the mortgage.⁴ Nor, it is said, where the mortgagor has had possession of any part of the land.⁵ Nor is it a bar to redemption, unless there be actual possession. Paying taxes on wild land is not sufficient.⁶ So a mortgagor is not barred by twenty years' possession, if the possession of the mortgagee was under an absolute deed, with an agreement that the mortgagor might redeem when he found it convenient; no notice or request as to redemption being shown. In such case, a sale by the mortgagee, barring the equity of redemption, creates a constructive trust in favor of the mortgagor.⁷ So where a statute was passed, repealing a former act, which limited the redemption of mortgages to twenty-one years, and providing that after that period the mortgagee might have a sale on execution for satisfaction of the debt, &c.; held, mere possession of the mortgagee for twenty-one years did not affect the right of redemption.⁸ So an account rendered by the mortgagee, or an acknowledgment made, in his answer to a bill in equity,

¹ *Howel v. Price*, Gilb. 106. See p. 5, n.

² *Yates v. Hambly*, 2 Atk. 359.

³ *Crooker v. Jewell*, 31 Maine, 306.

⁴ *Hansard v. Hardy*, 18 Ves. 455.

⁵ *Coote*, 596.

⁶ *Bollinger v. Chouteau*, 20 Mis. 89.

⁷ *Wyman v. Babcock*, 2 Curt. 386.

⁸ *Birnie v. Caystile*, 40 Eng. Law & Eq. 28.

to sell, and remainder to his children; held, that fifteen years' undisturbed possession by the mortgagee, during the life of the widow, was a bar to the right of redemption of the children. *Lockwood v. Lockwood*, 1 Day, 295.

So a succession of rights does not prevent the presumption of payment arising from lapse of time. *Whitney v. French*, 25 Verm. 663.

that the mortgage still subsists as such; will save the right of redemption.¹ Or a private account of the profits, treating the estate as subject to redemption.² Or a submission to redemption.³ Or a contract by the heir of the mortgagee to purchase the equity of redemption; even after a possession of the mortgagee for forty years, and seven years before suit brought.⁴ So, where the mortgagee had promised that the mortgagor should be at liberty to redeem after twenty-seven years; a redemption was allowed after forty-one years.⁵ So redemption was allowed fifty years after the making of the mortgage, and after forty-seven years' possession of the mortgagee; there having been five ejectments to try the title, and refusal by four several answers to account.⁶ So it has been held, that a conveyance of the estate by the mortgagee, *subject to redemption*, is sufficient; though it is otherwise, it seems, where the words, "if any," are added.⁷ So an acknowledgment made to a grandfather, tenant by the curtesy, of the right of his infant granddaughter, entitled as heir to the inheritance, was held sufficient, as being made to her *agent*.⁸ So where a mortgagee, having been in possession about twenty years, commenced proceedings to foreclose by advertisement under the statute; this was held a recognition of the mortgage, and the mortgagor allowed to maintain a bill for redemption.⁹ So the statute of limitations does not apply, where there has been any fraud or oppression; or any unfair means used to clog the redemption.¹⁰ Or a suit has been commenced upon the mortgage debt.¹¹ So where, twenty-three years after the date of the mortgage, the mortgagee made a will, devising that in case of redemption the mortgage money should go in a certain way; it was held that the heir of the mortgagor, bringing a bill to redeem six-

¹ *Dexter v. Arnold*, 1 Sumn. 109.

² *Fairfax v. Montague*, 2 Ves. 84.

³ *Proctor v. Oates*, 2 Atk. 140.

⁴ *Conway v. Shrimpton*, 5 B. Par. Cas. 187.

⁵ *White v. Pigeon*, Toth. Tit. 102, p. 100.

⁶ *Palmer v. Jackson*, 5 B. P. C. 281.

⁷ *Smart v. Hunt*, 4 Ves. 478, n.;

Hardy v. Reeves, Ibid. 480.

⁸ *Trulock v. Robey*, 12 Sim. 402.

⁹ *Calkins v. Calkins*, 3 Barb. 305.

¹⁰ *Spurgeon v. Collier*, 1 Ed. 55;

Ord v. Smith, Sel. Cas. in Cha. 9.

¹¹ *Cutts v. York, &c.* 6 Shepl. 191.

teen years after the date of the will, should be allowed to redeem.¹

21. But it is held that the acknowledgments of a mortgagee, made after he has assigned his interest, will not bind a purchaser without notice.² So, under the act of Wm. III., it is held that an acknowledgment of the mortgagor's title by a recital in an assignment of the mortgage, but to which the mortgagor is not party, will not stop the statute from running.³ Though it is otherwise, it seems, where the mortgagor is party to the assignment.⁴ Nor will the mortgage be affected by the account of a receiver.⁵ Nor by a mere demand of the mortgagor.⁶ So if a mortgagor file his bill to redeem and obtain a decree to account, he will be barred unless he prosecute his suit in twenty years.⁷

22. It has been doubted, whether parol evidence was sufficient to show an acknowledgment which would affect the rights of the mortgagee.⁸ But, if clear and unimpeachable, it has been held competent for this purpose.⁹

23. As the acts or declarations of the mortgagee, involving a recognition of the mortgage, preserve the rights of the mortgagor from the effect of lapse of time; so the rights of a mortgagee may be saved from the effect of long-continued possession, by similar acts or declarations of the mortgagor, showing a subsisting title in the mortgagee. Thus, where a mortgage was given on wild and unimproved land, of which neither party was in possession, there being evidence that the debts were unpaid, the lapse of thirty years is no bar to a foreclosure.¹⁰ And, in general, the mortgagee will not lose his right by lapse of time, where payment is negatived by evidence, as where there has been a promise to pay the debt within twenty years, a payment of interest, or an acknowledgment of the mortgage.¹¹ Thus, where the

¹ Ord v. Smith, Sel. Cas. in Cha. 9.

² Chouteau v. Burlando, 20 Mis. 482.

³ Dexter v. Arnold, 1 Sumn. 109; 2 Ibid. 109; 3 Mur. 218.

⁴ Lucas v. Dennison, 13 Sim. 584. But see Borst v. Boyd, 3 Sandf. Ch. 501.

⁵ Batchelor v. Middleton, 6 Hare, 75.

⁶ Barron v. Martin, Coop. 189.

⁷ 1 Ves. & B. 540.

⁸ St. John v. Turner, 2 Vern. 418.

⁹ Sel. Cas. in Cha. 9; 7 Paige, 465; 3 Sumn. 152; 10 Geo. 297.

¹⁰ Whiting v. White, 2 Cox, 295.

¹¹ Hughes v. Edwards, 9 Wheat. 489; Martin v. Bowker, 19 Verm. 526; Wright v. Eaves, 11 Rich. Eq. 582.

purchaser of land, subject to a mortgage which was duly recorded, within twenty years prior to the filing of a bill for foreclosure recognized the existence of the mortgage as a good, subsisting incumbrance; held, although the mortgage had been due over twenty years, neither he, nor those claiming under him by a title acquired subsequent to the acknowledgment, could set up the statute of limitations as a bar to the suit.¹ So the acknowledgment of one who does not own the whole equity at the time, but afterwards acquires it, is held to bind him and the estate.² And, although the lapse of twenty years, without payment of interest, or demand made, the mortgagor being in possession, will raise the presumption that the debt has been paid; yet that presumption may be repelled by evidence that the mortgagor was a near relative of the mortgagee, or in embarrassed circumstances.³ So a statute foreclosure, though after twenty years, rebuts the presumption of payment arising from lapse of time.⁴ But by the lapse of twenty-six years, parties beneficially interested in a mortgage were held to lose the right to enforce it, though its existence was unknown to them during the whole period; there being no intentional concealment.⁵

24. With regard to the party against whom the statute may operate; it is held that a *judgment creditor* cannot redeem, after a suit for that purpose by the mortgagor, would be barred by the statute, unless, perhaps, under very peculiar circumstances.⁶

25. The question has been raised, whether even the debt itself, which is secured by a mortgage, might not be thereby saved from the operation of the statute of limitations, by which it would otherwise be barred.⁷ It has been held in the Circuit Court of the United States, that, if the statute of

¹ Heyer v. Pruyn, 7 Paige, 465.

² Richmond v. Aiken, 25 Verm. 324.

³ Vannmaker v. Van Buskirk, Saxt. 685.

⁴ Jackson v. Slater, 5 Wend. 295.

⁵ Newcomb v. St. Peter's, &c. 2 Sandf. Ch. 636.

⁶ Tucker v. White, 2 Dev. & Bat. Ch. 289.

⁷ See Heyer v. Pruyn, 7 Paige, 465; Den v. Spinning, 1 Halst. 473; Miller v. Helm, 2 Sm. & M. 687; Cheslyn v. Dalby, 2 Y & Coll. (Exch.) 170.

limitations runs long enough to bar a debt secured by mortgage, and has not barred a bill or suit as to the property, the debt is protected by the mortgaged property, and will not be barred till a suit for the property is barred.¹ So it is held, that the receipt of the profits by a mortgagee keeps the debt alive against the statute of limitations.² So, under the peculiar circumstances of the following case, the mortgage and the claim secured by it were held to be so connected together, that the latter was saved from the effect of lapse of time by means of the former. One Nodin applied to the plaintiff for a loan of £300 on mortgage, but the plaintiff refused to advance the money without having in addition a joint and several note from Nodin and the defendant for £50, payable on demand. Thereupon a note and mortgage were made, the mortgage containing a covenant by Nodin to pay £300 and interest. Several half-yearly payments of interest upon £300 were made, but it did not appear that the property was not of sufficient value to pay the debt, or that the payments had been applied to the interest. Held, all the securities were kept alive, and the defendant could not avail himself of the statute of limitations in a suit upon the note. The decision was put upon the ground, that the whole transaction was a single one, the loan being made upon mortgage, and the note given as collateral security; and therefore, so long as interest was paid on the whole sum, all the securities remained in force.³ So, in Massachusetts, if the maker of a promissory note, which has been transferred by indorsement without date, give the indorsee a mortgage, after six and within twenty years from the time of payment of the note, to secure "such sums of money as the said (mortgagor) may at this time owe the said" (mortgagee); the presumption is, that the note had been indorsed before the making of the mortgage; the mortgage is in equity an acknowledgment that the note was then due; and the mortgagor cannot redeem without paying the note.⁴

¹ *Almy v. Wilbur*, 2 W. & Min. 371.

³ *Dowling v. Ford*, 11 Mees. & W.

² *Brocklehurst v. Jessop*, 7 Sim. 329.

438.

⁴ *Baleh v. Onion*, 4 Cush. 559.

26. But, in the same State, it was previously held, that a note secured by mortgage, which had been due more than six years at the death of the maker, and was presented by the administrator, who was himself the holder, to the Probate Court for allowance, was rightly rejected by that Court, and could not be allowed by the Supreme Court of Probate in virtue of its equity powers, by reason of its being connected with the mortgage.¹

27. A similar question has arisen, in regard to a covenant for payment of the debt, contained in the mortgage itself. Thus, in case of a mortgage, with a covenant to pay the debt, the mortgagor, and the mortgagee as his surety, afterwards conveyed the premises, in trust, to sell them, and pay, first a debt from the mortgagor to the trustee, which both mortgagor and mortgagee covenanted to pay; and secondly, to pay the mortgage debt. The mortgagor subsequently executed to the mortgagee an equitable charge on other property. Seventeen years afterwards, the trustee sold the estate, and applied the proceeds in part payment of his debt. Eight years afterwards, a bill was filed by the mortgagee against the mortgagor to realize the equitable charge. Held, until the trust was exhausted by the sale, the covenant in the mortgage was unaffected by lapse of time; that the debt and the personal remedy to recover it subsisted at the filing of the bill, and the equitable charge was therefore then in force. This charge was held to be, as to the principal debt, only a collateral security in aid of the trust to sell, and to remain in force so long as the debt existed.²

28. A statute, providing that "actions upon notes secured by mortgage may be brought as long as the plaintiff is entitled to commence any action upon the mortgage," was held inapplicable to a signer of the mortgage note, who was not also a party to the mortgage; and this, whether he were principal or surety, or whether the mortgage were given with or without his consent.³ It was remarked by

¹ Grinnell v. Baxter, 17 Pick. 383; acc. Lingan v. Henderson, 1 Bland, 282.

² Bennett v. Cooper, 9 Beav. 252.

³ Savings, &c. v. Ladd, 40 N. H. 459.

the Court, that no other similar statute had been enacted in England or America.) Contrary to the prevailing rule, it is held in Texas, that, if the debt be barred by the statute of limitations, the mortgage will be barred also.¹ The revival of the debt by a new promise will also operate as a revival of the mortgage, without words to that effect in the new promise. But not if there be an expressed intention to the contrary.²

29. But whether or not a debt secured by mortgage is barred by the statute of limitations, an action may still be maintained upon the mortgage, notwithstanding the lapse of a period of time sufficient to bar the debt, if it stood alone.³ (o) The fact, that an action on the debt is barred, raises no presumption of payment.⁴ Thus the demandant claimed under a mortgage, given to secure certain notes, which were barred by the statute of limitations, and the tenant under a subsequent mortgage of the same premises, made expressly subject to the prior incumbrance. Held, the claim upon the first mortgage was not barred. Putnam, J., says: "A reference to the condition contained in the mortgage, shows that it is to be and remain in full force until the debt shall *be paid*. The creditor has a double remedy: one upon his deed, to recover the land; another upon the note, to recover a judgment and execution for the debt; and it does not follow that he cannot recover on one, although there may be some technical objection or difficulty to his recovery upon the other. The debt remains, although the statute of limitations may discharge the remedy upon the note. Thus, in 3 Esp. R. 81, *Spears v. Hartly*, it was held by Lord Eldon,

¹ *Perkins v. Sterne*, 23 Tex. 561.

² *Ibid.*

³ *Thayer v. Mann*, 19 Pick. 535-537; *Ohio, &c. v. Winn*, 4 Md. Ch. Dec. 253; *contra*, *Duty v. Graham*, 12 Tex. 427; *Fisher's, &c. v. Mossman*, 11 Ohio St. 42; *Wilkinson v. Flowers*, 37

Miss. 579. See *Hammonds v. Hopkins*, 3 Yerg. 525; *Baldwin v. Norton*, 2 Conn. 163; *Richmond v. Aiken*, 25 Verm. 324.

⁴ *Wilkinson v. Flowers*, 37 Miss. 579.

(o) The same principle applies to a mortgage of personal property. *Crane v. Paine*, 4 Cusb. 483.

that where a creditor obtains possession of goods on which he has a lien for a general balance, he may hold in virtue of his lien, although the statute of limitations has run against a part of his demand. The debt was not discharged by the statute; it was the remedy only which was affected. If there were no reference in the condition to the notes, the case would seem too clear for argument; thus, if the condition were, that the mortgage should be void when the mortgagor or his executors, &c. should pay a certain sum of money, with lawful interest, it would be in that respect like a Welsh mortgage, and nothing short of payment would defeat the title of the mortgagee. Now, the reference to the notes recognizes the debt. The mortgage is given to secure the payment. It is to be discharged and rendered of no effect when the debt is *paid*. In *Toplis v. Baker*, 2 Cox, 123, it was said by the Court, that ‘if the collateral security had been a note of hand instead of a bond, the statute of limitations would run against the note and leave the mortgage as it was.’” So a mortgage, to indemnify the mortgagee for his liability as surety upon a note of the mortgagor, creates a trust and an equitable lien for the holder of the note, subject to which the mortgagee holds the land, though the note be barred by the statute of limitations, and as between the mortgagee and mortgagor the mortgage be foreclosed.¹ (*p*) So a mortgage, made to secure a note which is barred by the statute of limitations when the mortgage is given, is a valid security.² And where a mortgage is taken to secure a note, and the remedy on the latter is barred by the statute of limitations, the debt being unpaid, the creditor may avail himself of the statutory remedy to foreclose his mortgage in satisfaction of his debt.³

¹ *Eastman v. Foster*, 8 Met. 19.

³ *Elkins v. Edwards*, 8 Geo. 325.

² *Merrills v. Swift*, 18 Conn. 257.

(*p*) And this trust will bind creditors and purchasers of the land, or the assignee of the mortgagor under the insolvent law; not being a *secret* trust, but the registration of the mortgage being legal notice to all the world. *Ibid*.

30. But the non-production of the personal security, in connection with great lapse of time, will operate as a bar to a suit upon the mortgage, to recover the land. Thus, in 1814, an action was brought by the administrator of the mortgagee upon a mortgage dated in 1773. The plaintiff produced a record copy of the mortgage, but not the original mortgage or the note. It appeared that in the Revolutionary war, the mortgagee's shop, in which many of his papers were kept, was burned. There was no evidence of possession or a demand of possession, till a few weeks before commencement of suit; nor of any demand of payment of the note. But it was proved that in 1776 the mortgagor left the State and soon died. The defendant claimed under conveyances from the mortgagor, and subsequent continued possession. Held, even if the original securities were produced, the lapse of time would raise a presumption of payment, and be a bar to the action. This presumption was not rebutted by the mortgagor's leaving the State, because the note was due before he left, and the land might have been resorted to afterwards. But, moreover, the office copy was not legal evidence, the loss of the original not being sufficiently proved.¹

¹ *Inches v. Leonard*, 12 Mass. 379.

CHAPTER XXVI.

FORECLOSURE BY PROCEEDINGS AT LAW AND IN EQUITY.

1. Foreclosure by bill in equity ; *strict foreclosure* or *sale* ; the Civil Law.
 7. Foreclosure by *sale* : remarks upon the objects and policy of this practice.
 14. Form of the decree as to the time of payment ; extension of time, and opening of the foreclosure ; decree in the case of *infants*, &c.

1. It has been shown, (ch. 25,) that a mortgagor may be barred of his right of redemption by *lapse of time*, and the mortgagee's undisturbed possession. In addition to this general limitation, the law has provided more specific modes of barring or foreclosing an equity of redemption, after breach of condition. (*a*)

2. Two general methods are provided by law for this purpose independent of statutory regulation ; both through the medium of a bill in equity. In the language of the old law, the mortgagee is allowed to exhibit his bill.¹ (*b*) The one *a*

¹ Com. Dig. Chancery 4, A. 11.

(*a*) And this without reference to the *amount* of the debt. "The question in an action of ejectment is not, what is the amount of the debt? but has the plaintiff a right to the land? It is perfectly immaterial, whether £10 or £10,000 is due on the mortgage; the right of possession is equally perfect in either case, and of consequence his right to a recovery." Per Boudinot, J., *Den v. Spinning*, 1 Halst. 471. The same remarks are equally applicable to a bill in equity as to a suit at law.

(*b*) Equity alone can decree a reconveyance ; and, as a necessary incident, may adjust the accounts between the parties. *Breckenridge v. Brooks*, 2 A. K. Marsh. 335.

It is held that, a party may forego the statutory remedy, and bring a bill in equity. *Riley v. McCord*, 24 Mis. 265.

Chancery jurisdiction is very broadly exercised in favor of a mortgagee.

strict foreclosure, as it is commonly entitled, whereby, after certain proceedings, the mortgagee is either expressly or by mere operation of law adjudged absolute owner of the property to which he had before only a conditional or defeasible title. This is said to be adopted only where the interests of both parties require it, as where the mortgagor is insolvent, and the premises not of sufficient value to pay the debt and cost.¹ The other mode is *a sale of the property* under the direction of an officer of the Court, in which case the proceeds are applied to the discharge of incumbrances according to priority, and the balance, if any, paid over to the

¹ *Johnson v. Donnell*, 15 Ill. 97.

Thus, on a bill to foreclose a mortgage, if the premises are misdescribed, and it is shown by proper evidence what land was intended to be mortgaged, the instrument may be reformed, and the suit proceed to foreclosure. *Davis v. Cox*, 6 Ind. 481.

It is held, that, where a statute regulates the terms of redemption of mortgaged lands, sold under decrees for foreclosure, but does not in terms prohibit strict foreclosure, it may be well presumed by the court, that it was not mere inadvertence on the part of the legislature that the power to enter such decrees was not taken away. *Johnson v. Donnell*, 15 Ill. 97.

Where it was provided, in a deed of trust and mortgage, that the trustee should proceed to sell, in a certain event, upon the written request of certain beneficiaries; it was held, that, although it were admitted that the trustee could not have proceeded to sell, if the property had remained in Alabama, where the trust deed had left it, yet, when he was prevented by the acts of the defendant (running the property off to Texas) from executing the trust in the specific manner pointed out in it, and had to resort to a suit to foreclose the mortgage, it could be enforced by the direction and according to the rules of the forum to which the trustee had been compelled to resort, in order to secure the trust reposed in him. *Givens v. Davenport*, 8 Tex. 451.

Conveyance to A., in trust for sale, and to pay himself his debt, with a proviso for reconveyance on payment, and a covenant by A. not to sell until six months after notice to pay. Held, the object of the trust being to secure money, it was in the nature of a mortgage, though no equity of redemption was expressly reserved; and that A. was not entitled to a decree for an immediate sale, but that the debtor ought to have six months to redeem. *Bell v. Carter*, 19 Eng. Law & Eq. 56.

mortgagor. Land mortgaged in fee may be sold under a foreclosure, as well as personal property and estates for years in land.¹ Foreclosure being clearly within the jurisdiction of equity, it is held that a court of equity, having obtained jurisdiction for this purpose, may give full relief, and order a sale.² And, after a sale, there will be no right of redemption, except such as is expressly provided by statute.³

3. With regard to the method of foreclosing by a sale, where no power of sale is expressly reserved in the mortgage deed itself, Chancellor Kent truly says:⁴ — “If a freehold estate be held by way of mortgage for a debt, it may be laid down as an invariable rule, that (in order to a sale) the creditor must first obtain a decree for a sale under a bill of foreclosure. There never was an instance where a creditor, holding land in pledge, was allowed to sell at his own will and pleasure. It would open a door to the most shameful imposition and abuse.” (c) Thus it has been held, that where a mortgagee, without foreclosure, sells the property; he is accountable for its full value, without regard to the price; although the mortgagor, by filing a bill against him, not

¹ *Lansing v. Albany, &c.*, Hopk. 102; *Johnson v. Donnell*, 15 Ill. 97. See *Ashhurst v. The Montour, &c.* 35 Penn. 30.

² *Belloc v. Rogers*, 9 Cal. 123.

³ *Weiver v. Heintz*, 17 Ill. 259.

⁴ *Hart v. Ten Eyck*, 2 Johns. Ch. 100; *Beckley v. Munson*, 22 Conn. 299; *Gunn v. Brantley*, 21 Ala. 633. (For an elaborate and learned opinion upon the right of sale, see *Mendenhall v. West, &c.* 36 Penn. 146 n.)

(c) It will be seen, (*infra*, § 6,) that this power was given to the mortgagee by the civil law. Upon a principle analogous to that stated in the text, the trustee, in a deed of trust to secure a debt, cannot sell the property until the amount of the debt is ascertained and settled; and either party may resort to chancery to have such amount ascertained, and an account of all matters affecting it ought to be directed. *Wilkins v. Gordon* 11 Leigh, 547. So it is good ground for setting aside such sale, after the death of the grantor, that the amount of the debt depended on unsettled accounts, and so was not ascertained, and there is cause to believe that the whole amount claimed was not due. *Gibson v. Jones*, 5 *Ibid.* 370.

While the mortgagee cannot sell the property without an order of Court,

being the purchaser, affirm the sale.¹ But a sale of part of mortgaged premises, by the mortgagee, prior to foreclosure, does not affect the equity of redemption, and is no obstacle to a subsequent foreclosure.²

4. The practice of foreclosure, like many other proceedings connected with the law of mortgages, has been traced to *the Civil Law*. With regard to the particular mode or form of foreclosure under *that* system, Judge Story remarks as follows :³ —

5. “ In the Civil Law, there were two remedies allowed to the mortgagee, a remedy *in rem*, and also a remedy *in personam* against the mortgagor for the debt. The general remedy *in rem* was by a sale by the mortgagee of the mortgaged estate, either under a judicial decree, or without such decree, by his own voluntary act of sale, after a certain fixed notice to the debtor. In either case, the sale, if *bonâ fide* and regularly made, was valid to pass the absolute title to the estate against the mortgagor and his heirs ; and the proceeds were first to be applied to the discharge of the debt ; and the surplus, if any, was to be paid over to the mortgagor, or his representatives. This seems to have been the ordinary course in the Civil Law, in order to obtain satisfaction of the debt out of the mortgaged estate. But in some cases, and especially where a sale could not be made effectual, a decree might be obtained, in the nature of a foreclosure, by which, after certain judicial proceedings, the absolute dominion of the property would be passed to the mortgagee. This was probably the origin of the present mode of extinguishing the rights of the mortgagor by a decree of foreclosure in a Court of Equity. The natural course, and certainly the most convenient and beneficial course for the mortgagor, would seem

¹ Bissell v. Bozman, 2 Dev. Ch. 229.

² Wilson v. Troup, 7 Johns. 25.

³ 2 Story's Eq. §§ 1024-1026 ; Coote, 567.

on the other hand, the Court has no jurisdiction to order a sale of the property freed from the mortgage, without the consent of the mortgagee. Wickenden v. Rayson, 35 Eng. Law and Eq. 252.

to be, for the Court to follow out the Civil Law rules on this subject; that is to say, primarily and ordinarily to direct a sale of the mortgaged property, giving the debtor any surplus after discharging the mortgage debts; and secondarily, to apply the remedy of foreclosure only to special cases, where the former remedy would not apply, or might be inadequate or injurious to the interests of the parties. This course has accordingly been adopted in many of the American Courts of Equity; and it is also the prevailing practice in Ireland. It is done without any distinction, whether there is a power to sell contained in the mortgage or not. In England, a practice widely different has prevailed. A bill for a foreclosure is deemed, in common cases, the exclusive and appropriate remedy; and the Courts of Equity in that country refuse, except in special cases, to decree a compulsory sale, against the will of the mortgagor. These Courts, however, have departed from this general rule, in certain cases: 1. Where the estate is deficient to pay the incumbrance; 2. Where the mortgagor is dead, and there is a deficiency of personal assets; 3. Where the mortgage is of a dry reversion; 4. Where the mortgagor dies, and the estate descends to an infant; 5. Where the mortgage is of an advowson; 6. Where the mortgagor becomes bankrupt, and the mortgagee prays a sale; 7. Where the mortgage or charge is purely equitable, as, for example, by a deposit of title-deeds; 8. Where the mortgage is of land, and by the local law is subject to a sale; such as, for example, in Ireland and America." (*d*)

6. The same writer further remarks, in relation to the rules of the Civil Law upon this subject: "Although the debt, for which the mortgage or pledge was given, was not paid at

(*d*) Under St. 15 & 16 Vict. c. 86, § 48, the Court will not decree a sale, instead of a foreclosure, without consent of the mortgagor, except under special circumstances. *Probert v. Price*, 17 Eng. Law & Eq. 38. As where there is such complication, that the ordinary decree would operate inconveniently. *Hiorns v. Holtorn*, 13 Ib. 596. And a sale must be asked at

the stipulated time, it did not amount to a forfeiture of the right of property of the debtor therein. It simply clothed the creditor with the authority to sell the pledge, and reimburse himself for his debt, interest, and expenses; and the residue of the proceeds of the sale then belonged to the debtor. It has been supposed by some writers, that to justify such a sale it was indispensable that it should be made under a decretal order of some Court, upon the application of the creditor. But, although the creditor was at liberty to make such an application, it does not appear that he might not act, in ordinary cases, without any such judicial sanction, after giving the proper notice of the intended sale, as prescribed by law, to the debtor. (See *supra*, § 3, n.) When the debtor could not be found, and notice could not be given to him, such a decretal order seems to have been necessary. And where a sale could not be effected, a decree in the nature of a foreclosure could be obtained under certain circumstances, by which the absolute property would be vested in the creditor. This authority to make a sale might be exercised, not only when it was expressly so agreed between the parties; but when the agreement between them was silent on the subject. Even an agreement between them, that

the hearing. A decree for foreclosure will not afterwards be changed into an order for sale, on motion. *Girdlestone v. Lavender*, 15 Eng. Law & Eq. 9. See *Smith v. Boucher*, 17 Ib. 63; *Bellamy v. Cockle*, 23 Ib. 388; *Wayn v. Lewis*, 21 Ib. 501; *Jenkin v. Row*, 11 Ib. 297.

In a foreclosure claim, the defendants appeared to the claim, but, though summoned, not at the hearing. Held, the plaintiff could not claim an immediate sale, but an account should be taken, and, in default of speedy payment, a sale made. *Smith v. Robinson*, 17 Eng. Law & Eq. 450.

On a claim by an equitable mortgagee under a deposit of title-deeds, with a memorandum for securing a running balance, for a specified amount, a sale will be ordered. *Lloyd v. Whitley*, 21 Eng. Law & Eq. 23. See *Pryce v. Bury*, 23 Ib. 75.

Where a mortgagor requests a sale, his deposit should be sufficient to cover an unsuccessful attempt to sell. *Bellamy v. Cockle*, 23 Eng. Law & Eq. 388. See *Proper's, &c.* 19 Ib. 604; *Hurst v. Hurst*, Ib. 374.

there should be no sale, was so far invalid, that a decretal order of sale might be obtained upon the application of the creditor. On the other hand, if by the agreement it was expressly stipulated, that, if the debt was not paid at the day, the property should belong to the creditor in lien of the debt, such a stipulation was held void, as being inhuman and unjust.”¹

7. The following remarks, upon the comparative policy of the two methods of foreclosure above referred to, are made by the Court in New York. Chancellor Jones gives a long and elaborate opinion, in justification of the practice adopted in that State, of foreclosing by a sale. It was argued, that this course is not justifiable, because the mortgagee's title is a mere chattel interest, and therefore nothing more can pass by the sale. But the decisive answer was made to this objection, that it is not the mortgagee's title which is transferred, but the interest of both parties, constituting together the whole estate. (*e*)

8. “In early times, when the mortgage was still regarded as a conditional sale of the land, rather than as a mere secu-

¹ Story's Eq. §§ 1008, 1009.

(*e*) Acc. *Carter v. Walker*, 2 Ohio, N. S. 339. By *succession* to the mortgagee himself, the title of the purchaser at a sheriff's sale, under proceedings upon a mortgage, *relates* to the date of the mortgage. *De Haven v. Landell*, 31 Penn. 120; acc. *McMillan v. Richards*, 9 Cal. 365.

Where a mortgagor conveys the land mortgaged, reserving a right of way, and the land is afterwards sold under the mortgage; the way is extinguished. *King v. McCully*, 38 Penn. 76.

A mortgagor having transferred his estate, the mortgagee brought a suit for foreclosure against him, under which the land was sold. Held, by this sale the mortgagee's interest passed, subject to redemption by the mortgagor's grantee; that the execution purchaser was subrogated to the mortgagee to the amount of the price paid by him; that the grantee must pay this amount, in order to redeem, although the mortgagor was bankrupt; and that the execution purchaser, if in possession, must account for the rents and profits. *Childs v. Childs*, 10 Ohio St. 339.

rity for the payment of a debt, an adherence to the form of the condition in the application of the remedy of the mortgagee was natural; and it would necessarily lead to the decree of strict foreclosure, requiring the mortgagor to perform the condition, by paying the debt within a given time, to be limited by the Court; or to be forever barred and foreclosed of his right to redeem. The effect of such a decree, it will be seen, would be, that the mortgagee would take the land for the debt; and in a country where the laws do not permit the sale of real estate by execution at law, for the satisfaction of debts, there might be some apology for preferring the foreclosure to the sale. But in modern times, when the more liberal principle has gained the ascendancy, which deals with the mortgage as being in its substance and legal effect, a mere security for the payment of the debt; and in this State, where the lands of the debtor are subjected to sale for the satisfaction of his debts, it would be strange indeed that a court of equity should be without the power to decree a sale of the mortgaged premises for the satisfaction of the debt, and the mortgagee confined to a decree for a strict foreclosure.”¹

9. Chancellor Jones proceeds further to remark:—“The opposition of the mortgagee to a sale, would indeed be more plausible than that of the mortgagor; as there is ground for contending, that the mortgagee, in default of the mortgagor to redeem, may, at his election, have the estate sold, or the equity of redemption barred by a strict foreclosure without a sale. If the Court may, when equity requires it, interpose at the instance of the mortgagor to direct a sale, when the estate is of greater value than the debt, in order to prevent a strict foreclosure to his prejudice; so it ought, on the same principle, to extend the same relief to the mortgagee, by ordering a sale when the premises are insufficient to satisfy the demand, in order to enable him to obtain the benefit of

¹ Per Jones, Chancellor, *Lansing v. Stuyvesant*, 10 Paige, 490; *Gray v. Golet*, 9 Cow. 352. See *Loomis v. Toomer*, 5 Rich. 261.

his security, without waiving his right to claim the deficiency from the debtor's other property."¹

10. The same views are expressed by Chancellor Kent in the following case.

11. Bill against several defendants, all of whom except one were heirs of the mortgagor, two of the heirs infants, and the rest of full age. The bill was taken *pro confesso* against the adults, and the infants appeared and answered by their guardian. At the hearing, a decree was made for a sale of the mortgaged premises, and Chancellor Kent, after adverting to the course of proceeding in England, states, that the practice in New York has been to sell and not to foreclose, as well where infants as where adults are concerned; that this is the most beneficial course to the infant as well as the creditor, and there can be no doubt of the authority of the Court to pursue it.² (f) So in Maryland,³ Bland, Ch., says, with reference to the form of decree against an infant mortgagor:— "The advantage of a sale of the realty in such cases, is most manifest; for if, instead of ordering a sale, the Court were to pass a decree of foreclosure, the whole estate would be lost to the infant, whereas if it should be worth more than the mortgage debt, by a sale, the surplus would thus be saved, and returned to him. Hence the infant, by a sale, may gain but cannot lose." (g) And the

¹ Per Jones, Chancellor, *Lansing v. Goelet*, 9 Cow. 355, 356.

³ *Williams's case*, 3 Bland, 193, 194. See *Humes v. Shelby*, 1 Overt. 79.

² *Mills v. Dennis*, 3 Johns. Ch. 367.

(f) Where it appears, after a decree of foreclosure, that the defendants are infants, the Court will not rehear the cause, nor expedite the foreclosure, but require a new or a supplemental suit. *Seamen v. Nicholson*, 19 Eng. Law & Eq. 436.

Where an infant owns the equity of redemption, and a surplus remains after paying the mortgage from the proceeds of a sale; such surplus descends, upon his death, as real estate. *Sweezy v. Thayer*, 1 Duer, 286.

In Alabama, in case of infants, it must be referred to a Master, to ascertain how much of the property requires to be sold for payment of the debt. *Fry v. Merchants'*, &c. 15 Ala. 810.

(g) In a foreclosure suit, the account having been taken, and a day

Court in North Carolina remark: — “It is not usual now to decree a foreclosure simply; for it is almost always more beneficial to the one or other of the parties to sell the premises; — and therefore the Court, upon the application of either, (*h*) directs an account of the debt, interest, and costs, and a sale for their satisfaction. It is not erroneous, however, to decree a foreclosure, when neither party asks the Court for a sale.” The Court proceed to remark: — “It does not appear that such an application was made in this case. Should either of the parties now desire it, the Court is quite willing that the decree should be so modified as to direct a resale by the Master, instead of a conveyance by him to the plaintiffs.”¹ But in that State, on a bill to redeem, a sale will not be decreed without consent.²

12. It is said, that the practice of foreclosing by a sale prevails in all the States of the Union except three or four;³ also, that the usual course is, to decree a sale; but the Chancellor may, with the consent of the mortgagors, decree the property absolutely to the mortgagee.⁴

13. A decree for sale is such a *final* decree as may be appealed from.⁵

14. Upon a decree to pay the mortgage debt, whether on a bill to redeem or to foreclose, a short period is usually

¹ Per Ruffin, C. J., *Green v. Crockett*, 2 Dev. & B. Eq. 393. See *Fleming v. Sitton*, 1 *Ibid.* 621; *Blockledge v. Nelson*, 2. 65.

² *Gillim v. Martin*, 2 Dev. Ch. 470.

³ *Mussina v. Bartlett*, 8 Por. 288; *Horde v. James*, 1 Overt. 201.

⁴ *Hunt v. Lewin*, 4 St. & P. 138.

⁵ *Ray v. Law*, 3 Cranch, 179.

appointed by the Master for payment, the defendants being all infants, the Court had appointed a guardian for them in the suit. An application was now made on their behalf, to extend the time for completing the foreclosure, they having no other property, and being unable to pay the interest and costs now due. Held, the fact of their infancy made no difference, and the time could be extended only on payment of the interest and costs. *Coombe v. Stewart*, 7 Eng. Rep. 167.

(*h*) Where the mortgagor comes into Court to obtain a sale, he must offer to redeem, notwithstanding a suggestion of his poverty. *Goldsmith v. Osborne*, 1 Edw. Ch. 560.

allowed, — and in general is held to be matter of right, an omission of which is ground for reversing the decree, — to pay the money. (i) Where this period is not regulated by statute, the usual course in Chancery, on a bill to redeem, is to allow *six months* after the debt is liquidated by the Master's report. But it is in the discretion of the Court to determine how long a time shall be allowed for redeeming, to be governed by the circumstances of each case.¹ A year and a month was held not too short a time.² On the other hand, where a bill to redeem was brought chiefly for the purpose of setting aside the mortgage as fraudulent, and had been long pending; ordered, that the plaintiff redeem in three months, or the bill be dismissed.³ So, though the time allowed is only thirty days, an appellate Court will presume that the discretion of the Court below was properly exercised, if no application appears to have been made below for an extension of time.⁴

15. The period first fixed will not ordinarily be enlarged on motion for further time, but the mortgagee will be quieted in his possession. But, on a bill for a strict foreclosure, vesting the estate absolutely in the mortgagee, the time may be enlarged from six months to six months, upon equitable terms, more especially where satisfactory reasons are given for the delay; though this indulgence is not ordinarily granted, in cases of a decree for the sale of the premises according to the usual practice of the Court. (j)

¹ Woodard v. Fitzpatrick, 2 B. Mon. 61; Harkins v. Forsyth, 11 Leigh, 294; Barnes v. Lee, 1 Bibb, 526; Fowler v. Byers, 16 Ark. 196.

² Turnstall v. M'Lelland, Hard. 519.

³ Perine v. Dunn, 4 Johns. Ch. 140.

⁴ Harkins v. Forsyth, 11 Leigh, 294; acc. Barnes v. Lee, 1 Bibb, 526.

(i) So where the plaintiff, in a bill to redeem, has a right of redemption, though upon payment of a larger sum than that stated in the bill, the proper decree is, that the plaintiff redeem within a certain time, or be foreclosed. Dunham v. Jackson, 6 Wend. 22.

(j) Motion by the defendant in a foreclosure suit, that the time fixed for payment of the debt, &c., might be enlarged for one month, or a longer period, after the final order had been signed and enrolled, and for this

15 *a*. The rule to allow six months is applied on a bill by an equitable mortgagee.¹

¹ 2 Greenl. Cruise, 158, n.; 4 Kent, K. Mar. 311; *King v. Longworth*, 7 181, 182; Coote, 569; *Jones v. Cres-* Ham. pt. 2, 231; *Durnett v. Whiting*, wieke, 9 Sim. 304; *Perine v. Dunn*, 7 Mon. 547; *Stead v. Banks*, 13 Eng. 4 Johns. Ch. 140; *Weller v. Harris*, 7 Law & Eq. 415; *Staines v. Rudlin*, 1b. Paige, 167; *Shannon v. Speers*, 2 A. 429.

purpose, the foreclosure opened on such terms as the Court might deem expedient, the defendant offering to pay into Court the amount due; and that, in the mean time, the plaintiff might be restrained from selling or encumbering the premises. A certain sum being found due under the decree, six months were allowed for payment, which period expired on the 3d of February. The money not being paid, the foreclosure was made absolute on the 12th. It appeared from the evidence, that, on the 17th of February, the mortgagee informed the mortgagor that all she wanted was her money, and that she would accept it, if offered. Afterwards, her solicitor said substantially the same, and subsequently, that the mortgagee would sell the estate, not wanting the property, but her money; and the balance would be paid to the mortgagor, amounting to £3,000. April 8th, the money was tendered to the solicitor, but he refused it; and two days afterwards, notice of this motion was served. Lord Cranworth, V. C., said:—"The question is, whether, on the merits, I ought to make the order. This depends on what is the doctrine of the Court with regard to mortgages. They are anomalous cases; the Court, in dealing with them, is governed by rules which are totally different from the rules which govern it in other cases. The contract between a mortgagor and a mortgagee has been treated by this Court, from time immemorial, as being something different from that which it purports to be, namely, as a contract for the repayment of money for which the mortgaged estate is a pledge; and the borrower may redeem it, notwithstanding the day named in the proviso for redemption has long passed. That being so, the question is, whether I can act upon that principle in the present case, without doing injustice to the mortgagee. It is quite impossible to lay down any general rule as to the circumstances which will induce the Court to open a decree for foreclosure. But the Court has a very strong inclination to give assistance to a mortgagor, if he applies promptly, and the Court has the means of giving the mortgagee immediate payment; and perhaps that is the guide which the Court has. I think, the promptness of the mortgagor is the great and important feature in the case. My opinion is, that it is quite out of the question, to say that the mortgagee is entitled to keep the estate, or that it is to be treated otherwise than as a pledge." Decreed, that the motion be granted on payment, by the 10th of June, of the

16. The decree should direct the payment by a day in term time, so that the Court, and not the commissioner, may judge whether or not payment has been made.¹

17. The time for payment may be renewed even after the decree is signed and enrolled. On enlargement of the time, the mortgagor will be decreed to pay the amount of interest and costs then found due by the Master's report.²

17 *a*. A purchaser, at sheriff's sale, of part of a tract of land mortgaged, has been allowed to come in, after the expiration of the time allowed by a decree for redemption by the mortgagor, and redeem the premises.³

18. Upon a bill to redeem, the decree should not be, that, on the plaintiff's "paying the money with interest, the mortgagee shall convey to him," &c., but that he shall convey upon payment, within a certain time, and, if not then made, the plaintiff be forever foreclosed of all equity of redemption, and the property sold,⁴ &c.

19. Where the bill is for foreclosure only, though the amount of the debt is determined by the report; a decree, confirming such report, and that the money be paid at such a day or the right of redemption barred and the property sold, is a decree for foreclosure only, not a money decree also, and a suit at law lies for the balance.⁵

20. If the mortgagor file a bill to redeem, a day be appointed for payment, and he make default and thereby the bill be dismissed; this is equivalent to a decree of foreclosure, as against the mortgagor and his heirs and purchasers *pendente lite*; and the time of payment will not be enlarged.⁶ But if a bill to redeem is dismissed for want of prosecution, and not for want of payment, the mortgagor will not be estopped from filing a second bill to redeem.⁷

¹ *Jouitt v. Gaither*, 6 Monr. 251.

² *Coote*, 569.

³ *1 Hay*, 482.

⁴ *Turner v. Turner*, 3 Munf. 66.

⁵ *Gray v. Toomer*, 5 Rich. 261.

⁶ *Coote*, 570; 4 *Kent*, 185.

⁷ *Hansard v. Hardy*, 18 Ves. 460.

sum reported due, and subsequent interest and costs, and all *bonâ fide* expenditures made under the order of February 12th. *Thornhill v. Manning*, 7 Eng. Rep. 97, 99, 100.

21. It is said in Alabama,¹ the practice of fixing a day for payment of the debt applies only to cases of strict foreclosure, not of sale. If applicable to the latter, the mortgagee would not have the rights and privileges of an ordinary execution creditor.² (*k*) In Kentucky, where the legal title resides in an absent defendant, a day should be given him to convey, before commissioners are appointed to do so; but on a bill to foreclose a mortgage, the title being in the mortgagee, no day need be given.³

22. In North Carolina a bill was brought to foreclose a mortgage. Cochran was mortgagor; he sold one moiety of the premises to Huitt and his partner in fee; their title came by a sheriff's sale to Spiller. The mortgagee had a decree of foreclosure, unless before a certain day the money was paid. That day was past, but no absolute decree of foreclosure yet entered. Spiller moved to be made a party, and to have the decree so altered, that he might be at liberty to pay the money for saving his equity of redemption. *Per curiam*. Let Mr. Spiller be at liberty to file a bill, stating his interest, and praying the decree may be so varied as to let him in to pay the money. It would be unjust to foreclose the equity of redemption, and bar his title to his moiety, which he acquired fairly, without putting it in his power to prevent the foreclosure by paying the money.⁴

23. In Ohio,⁵ a suit was brought to collect money secured by a mortgage. Lane, J., says: — "In all cases of this nature, the mortgagee may insist on a sale; and he is entitled to a decree for foreclosure, where two thirds the value of the mortgaged tenements does not exceed the amount of the debt. (1 Ohio, 235.) Where a sale is to be made, it is the

¹ *Mussina v. Bartlett*, 8 Por. 288, 289.

² See *Perine v. Dunn*, 4 Johns. Ch. 143.

³ *Bedford v. Duly*, 1 A. K. Marsh. 220.

⁴ *Spiller v. Spiller*, 1 Hay. 482.

⁵ *Higgins v. West*, 5 Ham. 356.

(*k*) It is also held, that sale may be made by the sheriff, and the decree need not require that he make return of such sale.

interest of all that no unnecessary delay should be made. In these cases, after the amount due shall be ascertained, either by a computation, or by reference to the Master, a decree may be entered, commanding the Master to make the amount of money due, by a sale of the mortgaged tenements, (or of so much as may be necessary,) under the forms and restrictions prescribed by the statute for the sale of lands by execution at law. But where the debt cannot be paid by a sale of the land, and the mortgagee is desirous to purchase, the value should be ascertained in some mode analogous to that directed by the execution law. A decree may be entered, directing the Master to cause a valuation, in the manner prescribed by that statute, and upon its return, a decree may be entered, either for foreclosure or sale, as the appraisement may justify; and in the event of a sale, no new valuation will be required; and this case will not cause the delay of a term, if this return of the value can be made during the session of the Court."

24. Where the mortgagor pays the debt after a decree for foreclosure, but pending the time limited for redemption; the mortgagee becomes a trustee for him, and is bound to release to him on request.¹

¹ Robinson v. Cross, 22 Conn. 171.

CHAPTER XXVII.

FORECLOSURE IN THE UNITED STATES. STATUTORY PROVISIONS
AND REMEDIES IN THE SEVERAL STATES.

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| 1. The remedies for foreclosure are generally regulated by statute. ¹ | 35. Alabama. |
| 2. The statute must be strictly pursued. | 40. Michigan. |
| 3. Whether the proceedings must conform to the law in force when the mortgage was made. | 49. Arkansas. |
| 5. Statutes of the several States, and judicial constructions thereof. | 50. Illinois. |
| 6. New York. | 65. Indiana. |
| 15. Pennsylvania. | 74. Ohio. |
| 18. Delaware. | 82. Missouri. |
| 19. New Jersey. | 86. Kentucky. |
| 22. Georgia. | 89 <i>a.</i> Iowa. |
| 27. South Carolina. | 90. Wisconsin. |
| 28. North Carolina. | 93. Minnesota. |
| 29. Maryland. | 94. California. |
| 30. Mississippi. | 95. Massachusetts, Maine, New Hampshire, Rhode Island. |
| 31. Florida. | 100. Massachusetts. |
| 33. Texas. | 101. Maine. |
| | 108. New Hampshire. |
| | 111. Rhode Island. |
| | 115. Vermont. |
| | 117. Connecticut. |

1. THE general rules and principles above stated, with regard to the foreclosure and redemption of mortgages, have been to some extent superseded by very minute statutory provisions in the several States of the Union. (*a*) This re-

(*a*) These statutes themselves are of course the only reliable guide in the last resort upon individual questions which may arise in practice. From the nature of the case, a general treatise, like the present work, cannot assume to present more than a general view of express enactments so numerous and detailed, and at the same time so fluctuating, as those which regulate the subject of foreclosure and redemption in the several States. The prevailing practice in any particular State, as stated in the text, may have been materially modified by late statutes, which have escaped notice.

It has been remarked in a recent case, (*King v. The State, &c.*, 7 Cush. 7,) with reference to the point, that a mortgagee is not strictly a *trustee*:—

mark does not apply to the doctrine of extinguishment of the title, either of the mortgagee or the mortgagor, by *lapse of time*, (*supra*, ch. 26,) which seems still to remain, for the most part, in full force; (*b*) but to the form of legal and judicial process, by which the rights of the respective parties are to be enforced. With regard to the right of redemption, after breach of condition, the uniform remedy is a bill in equity, inasmuch as the legal title has ceased to exist. (*Infra*, ch. 30.) On the other hand, the proceedings to enforce a mortgage, and obtain a foreclosure, are very various in the different States; in some, pursuing the English system of *bill and decree in equity*; in others, taking the form of *real action or ejectment*; in others, of *petition* or *scire facias*, provided as a summary remedy, adapted solely to this particular case. In some of the States, concurrent proceedings are allowed at law and in equity; and the general, though not universal rule, is, (as will be hereafter more particularly explained — see ch. 31,) that the mortgagee may at the same time, and in different actions, proceed to enforce the mortgage and the debt secured thereby.¹

2. It has been held, that, where sales under a mortgage are regulated by statute, the provisions of the statute must be strictly pursued.² Thus, where a statute requires the execution in an action upon a mortgage to be recorded, the

¹ See *Satterwhite v. Kennedy*, 3 Strobb. 457.

² *Sherwood v. Reade*, 7 Hill, 431; *Williamson v. Crawford*, 7 Blackf. 12.

“If this is true in England, where the rights of the mortgagee, after condition broken, are purely equitable, and such as are administered by a court of equity; much more in Massachusetts, where the right to redeem, after condition broken, is ascertained and regulated by law, as effectually as the right of the mortgagor (mortgagee) to hold for the security of the debt.”
Ib. p. 15.

(*b*) In North Carolina, it is provided, (1 N. C. Rev. Stat. 375,) that a presumption of payment of the mortgage, or an abandonment of the right of redemption, shall arise in ten years after breach of condition, or after the last payment is made on the mortgage, or the right of action has accrued.

levy of such execution without reasonable registration does not foreclose the mortgage, as against a *bonâ fide* purchaser without notice prior to the registration, or a second purchaser from him after registration.¹ So, in Maine, under stat. 1821, c. 39, a mortgage cannot be foreclosed "by the consent in writing of the mortgagor," without an actual entry by the mortgagee, or those claiming under him, for condition broken.² And, if a foreclosure is void, the fee still remains in the mortgagor, and no action can be maintained, either of ejectment or trespass, which affirms the title to be in the mortgagee.³ But, although a statutory foreclosure be irregular, and no bar to the equity of redemption, yet the purchaser at such sale succeeds to all the interest of the mortgagee.⁴

3. It has been also held, that a foreclosure sale must be conformable to the law which was in force when the mortgage was executed.⁵ (c) And where a State law provided, that a mortgagor's equitable title should not be extinguished for twelve months after a sale under a decree in Chancery, and that no sale should be made for less than two thirds of the appraised value of the property; such law was held invalid, under the Constitution of the United States, as impairing the obligation of contracts.⁶ So where a mortgage, made before the passage of the act, which required sales to be on a credit of two years, unless the complainants would accept the notes of the bank of the commonwealth, contained a stipulation, that the mortgagee

¹ Robbins v. Rice, 7 Gray, 202.

² Pease v. Benson, 28 Maine, 336.

³ Vanslyke v. Shelden, 9 Barb. 278.

⁴ Gilbert v. Cooley, Walk. Ch. 494.

⁵ Sheets v. Peabody, 7 Blackf. 613;

Wolf v. Heath, Ib. 154; Franklin v. Thurston, 8 Ib. 160.

⁶ Bronson v. Kinzie, 1 How. U. S. 311; McCracken v. Hayward, 2 Ib. 608; 17 Pet. 28.

(c) The act of Georgia, confiscating the estate of the mortgagor, was held no bar to the claim of the mortgagee, a British merchant, whose debt was only sequestered during the war, the estate of the mortgagee not having been confiscated. Higginson v. Mein, 4 Cranch, 415.

might sell the estate for ready money; held, the Chancellor was bound to enforce the sale for cash, when appealed to after the passage of the act.¹ So where, between the time of giving a mortgage with power of sale, and a sale under the power, the time of redemption was changed from two years to one; held, the right still continued two years.²

4. But a statute, authorizing sales of mortgaged premises, under the power of sale contained in a mortgage, upon a notice of twelve weeks, was held not unconstitutional and void, so far as it operated upon mortgages in existence at the time of its passage; notwithstanding that previous to that statute a notice of twenty-four weeks was necessary.³ And such power, authorizing the mortgagee, in case of default in payment, to sell *according to law*, shall be construed to mean, according to the law in force at the time the sale became necessary.⁴ So the Indiana act of 1843, concerning foreclosure, was held to apply to mortgages previously executed.⁵

5. The following are in substance the statutory provisions of the several States upon this subject:—

6. In New York, it is said the methods of foreclosure are quite similar to those in Michigan and Minnesota.⁶

7. In this State, ejectment cannot be brought upon a mort-

¹ Pool v. Young, 7 Monr. 587.

² Cargill v. Power, 1 Mann. 369.

³ James v. Stull, 9 Barb. 482.

⁴ Per Johnson, J., James v. Stull, 9 Barb. 482.

⁵ Withrow v. Clark, 2 Cart. 107; acc. Doe v. Woodward, 1, 446.

⁶ 1 Wash. R. P. 601. See §§ 40, 93. See, in addition to cases elsewhere cited, M'Lean v. Towle, 3 Sandf. Ch. 117; Allen v. DeWitt, 3 Comst. 276; Mechanics' &c. v. Roberts, 1 Abb. Pr. 381; Wheeler v. Van Kuren, 1 Barb. Ch. 490; Connecticut v. Sheridan, Clarke, 533; Ferris v. Ferris, 16 How. Pr. 102; 28 Barb. 29; Engle v. Underhill, 3 Edw. 249; Nott v. Hill, 6 Paige, 9; Lane v. King, 8 Wend. 584; Thompson v. Somerville, 16 Barb. 469; Hone v. Fisher, 2 Barb. Ch. 559; Burns v. Nevins, 27 Barb. 493; Merrian, 4 Denio, 254; Doolittle v. Lewis, 7 John.

Ch. 45; Loring v. Halling, 15 John. 119; Cole v. Moffitt, 20 Barb. 18; Hornby v. Cramer, 12 How. Pr. 490; Jackson v. Clark, 7 John. 217; Westgate v. Handlin, 7 How. Pr. 372; Sayles v. Smith, 12 Wend. 57; Cole v. Savage, Clarke, 361; Jackson v. Henry, 10 John. 185; — v. Dominick, 14 John. 435; Hyland v. Stafford, 10 Barb. 558; St. John v. Bumpstead, 17 Barb. 100; Wetmore v. Roberts, 10 How. Pr. 51; Eddy v. Smith, 13 Wend. 488; Waller v. Harris, 7 Paige, 167; Layman v. Whiting, 20 Barb. 559; Bryan v. Butts, 27 Ib. 503; Moss, 6 How. Pr. 263; Collins v. Standish, 6 How. Pr. 493; Kendall v. Treadwell, 5 Abb. Pr. 16; McKinstry v. Mervin, 3 John. Ch. 466 n.; Spencer v. Harford, 4 Wend. 381; Morgan v. Plumb, 9 Wend. 287; Lawrence v. Lawrence, 3 Barb. Ch. 71.

gage.¹ Upon a bill for foreclosure or satisfaction, the Court may decree a sale of the whole or a part of the land. When a bill is filed for satisfaction, the Court may not only compel delivery of the land to a purchaser, but, on return of the report of sale, decree payment of any balance remaining due, and recoverable by law, either by the mortgagor or a surety, if the latter be joined in the bill; and issue executions, as in other cases. (*d*) During, and after such process, no suit at law shall be brought for the debt, unless authorized by chancery. The bill must set forth, whether any proceedings have been had at law upon the debt; and if judgment has been recovered, the bill will be dismissed, unless the sheriff has returned on execution, that the debtor has no property, except the premises mortgaged. (*e*) Sales shall be made, and deeds given, by a Master, and shall vest the same title in the purchaser, that a foreclosure would have vested in the mortgagee, and shall be as valid as if executed by both mortgagee and mortgagor. The surplus proceeds shall be brought into court, for the use of the defendant or other party entitled, and, unless taken out in three months, invested for their benefit. If the bill is filed for the payment of an instalment or of interest, it shall be dismissed, upon the defendant's paying the amount due, with costs, before the decree for a sale. If paid afterwards, proceedings shall be stayed, but a decree of foreclosure and sale entered, to be enforced upon any subsequent default, on a new petition, and by a further order. In such case, the Court will ascertain, through a Master, whether a portion of the land may

¹ 2 N. Y. Rev. Stat. 312; *Stewart v. Hutchins*, 6 Hill, 143. See, as to redemption, Stat. 1838, 262.

(*d*) See *Manhattan, &c. v. Greenwich, &c.* 4 Edw. Ch. 315, *Potter v. Rowland*, 4 Seld. 448; *Pell v. Ulmar*, 21 Barb. 500.

(*e*) See *North River, &c. v. Rogers*, 8 Paige, 648; *Shufett v. Shufett*, 9 Paige, 137. An affidavit, under the statute, of the sum due upon a mortgage, which states "the sum of —— dollars" as claimed by this deponent, is insufficient. *People v. Becker*, 20 N. Y. 354.

be sold, sufficient to pay what is due, and decree accordingly. If a sale of the whole will be most beneficial, such sale will be decreed, and the whole debt paid, deducting interest on the portion not due, if payable without interest; or the Court may order such portion put out at interest for the benefit of the parties.¹

8. Within fifteen months after an execution sale, the mortgagor may redeem the whole of the premises, or any part separately sold, subject to redemption by any other creditor.²

9. Where a tender was made of the purchase-money, and 10 per cent. interest; held, the tender, if not accepted, did not save the subsequent interest at 7 per cent. unless the money had lain idle since the tender.³

10. Where lands are mortgaged as one entire lot, and subsequently subdivided by the mortgagor into smaller lots for the purposes of sale or the convenience of the mortgagor; the mortgagee, upon a foreclosure, under the statute (2 Rev. St. 546, § 6,) is not bound to advertise and sell in parcels, but may sell the whole as one undivided lot, by the description in the mortgage.

11. This statute, requiring a sale in parcels, applies to premises consisting, at the time of giving the mortgage, of distinct tracts, farms, or lots, and mortgaged and described as such.⁴

12. A foreclosure by advertisement and sale, without service of the notice of sale upon the mortgagor, as required by the Act of May 7, 1844, is irregular and void.⁵

13. The plaintiff must serve a copy of the notice and sale on the mortgagor, if living, and if dead, on his personal representatives; and he must prove the death of the mortgagor by legal evidence, and not by mere hearsay or reputation.⁶

14. The statute does not require that notice of sale should

¹ 2 N. Y. Rev. Stat. 191, 193. See 9; *Bunce v. Reed*, Ib. 347; Sts. 1857, N. Y. Laws, 1837, 455, 456; 1838, 261, 667.

263; 1840, 289, 290; 1842, 383, 409; 1844, 529. Also *Cole v. Savage*, 1 Clark, 482; *Curtis v. Hitchcock*, 10 Paige, 399; *Stanton v. Kline*, 16 Barb.

² N. Y. Stat. 1847, 508.

³ *Burr v. Stanley*, 4 Edw. Ch. 27.

⁴ *Lamerson v. Marvin*, 8 Barb. 9.

⁵ *Van Slyke v. Shelden*, 9 Barb. 278.

⁶ *Cole v. Moffitt*, 20 Barb. 18.

be served personally on those entitled thereto, nor left at their dwellings, even if they reside in the same place with the foreclosing party, or his or their attorney. It is sufficient if copies are deposited in the post-office, where the parties reside, twenty-eight days prior to the sale, properly folded and directed to them at their respective places of residence.¹

15. In Pennsylvania, (*f*) after twelve months from the day of payment of the debt or performance of the condition named in the mortgage, a *scire facias* may be issued against the mortgagor, and, upon execution issued thereon, the land may be sold as upon other executions; or, for want of purchasers, delivered to the mortgagee, not subject to redemption. If the mortgagee have released a part of the land, he may proceed against the remainder; but the mortgagor may plead, that the sum claimed is greater than ought proportionably to be charged upon the land. No sale or delivery of the mortgaged premises shall give any further term or estate in the land, than the land is mortgaged for. A sale upon a mortgage shall not affect the prior lien of any other mortgagee.² A mortgagor may, upon petition, pay into court the sum claimed, and have any objections tried, a satisfaction entered, or a reconveyance made.³

16. The *scire facias* is a proceeding *in rem*, and a substitute for a bill of foreclosure in chancery.⁴ It does not exclude the remedy by ejectment.⁵ The judgment is *de terris* merely, and the defendant is not personally liable for costs.⁶ The record must contain a sufficient description of the land, or such part as is necessary to be sold for payment of the debt; otherwise the judgment is void, though affirmed by the

¹ *Stanton v. Cline*, 1 Kern. 196.

² *Pard. Dig.* 191, 204, 292, 297; *Penn. Stat.* 1842, 66; *Stat. of April 6, 1830.* See *Roberts v. Williams*, 5 Whart. 170; *Mode, &c.* 6 W. & S. 280; *Henry v. Sims*, 1 Whart. 187; *Penn. Stat.* 1845, 489; 1849, 621, 681; *Magew*

v. Stevenson, 1 Grant, 402; *Stevens v. The North, &c.* 35 Penn. 265.

³ *Penn. Stat.* 1851, 871.

⁴ *Moore v. Harrisburg, &c.* 8 Watts, 151, 152; 19 Penn. 77.

⁵ *Martin v. Jackson*, 27 Penn. 504.

⁶ *Wickersham v. Fetrow*, 5 Barr, 260.

(*f*) In this State, in general, the Court cannot order a sale of mortgaged premises. *Ashhurst v. the Montour, &c.* 35 Penn. 30.

supreme court, and a sale conveys no title.¹ A terre-tenant cannot defend on his petition, unless by stipulation on the granting of his petition.²

17. It is said,³ “The claim in the action of *scire facias* is for money, and therefore a bare *chose in action*, not assignable at common law; and I am not aware that we have any statute expressly making it so. The *scire facias* is altogether different from an action of ejectment, which is brought for the recovery of the possession of the mortgaged premises, and rests entirely upon the right to the possession, which is considered as transferable. Upon this ground, the assignee may maintain ejectment in his own name.” It has been held that the lien of a mortgage is not merged in a judgment on *scire facias* on such mortgage, nor affected by the lapse of five years from the date of the judgment.⁴ But in a later case, where a mortgage was given to secure three bonds, payable at different times; and after the maturity of the first, but before that of the second, judgment was entered upon the first, execution issued, and the land sold, before the other bonds were due: held, the sale discharged the mortgage lien. Gibson, C. J., says: — “That a sale on a judgment for a debt, secured by a mortgage, discharges the lien of the mortgage, notwithstanding the Act of 1830, was asserted in *Pierce v. Potter*, (7 Watts, 477,) and put on what we think tenable ground. Though such a sale is within the letter of the act, it is not within its spirit, because it is not within the mischief which was intended to be remedied by it. The purport of it is, perhaps, to declare, that no mortgage or judgment shall bind more than the equity of redemption springing from a prior mortgage; and that no more shall be sold on a *liberari* or *fieri facias* by a subsequent incumbrancer. The design was to protect the mortgage from the intermeddling of subsequent creditors; but can a judgment creditor, who is himself the prior mortgagee, be deemed a subsequent creditor, or,

¹ *Wilson v. McCullough*, 19 Penn. 77.

² 5 Barr, 260.

³ Per Kennedy, J., *Moore v. Harrisburg*, &c. 8 Watts, 151.

⁴ *Helmhold v. Mann*, 4 Whart. 410.

in his capacity of mortgagee, an object of protection against himself? When he appears in a double character, a case has occurred which was not contemplated. Any one may renounce the benefit of a privilege provided for himself."¹ (g)

18. In Delaware, the mortgagee may sue out a *sc. fac.*, and have a sale on execution. If no sale can be made, the land may be set off by appraisement.²

19. In New Jersey it is provided by statute, that redemption shall be barred by possession of the mortgagee twenty years after default of payment. Upon a bill for foreclosure or satisfaction, the Court may order a sale of the whole or a sufficient portion of the land, either by a Master, or by a sheriff upon *fi. fa.* But the sale shall pass no greater estate than the mortgagee would have gained by foreclosure.³ The mortgagee may have a writ of *sc. fac.*, and the land may be sold on execution.⁴

20. Where a mortgagee brings a suit either upon the mortgage or the bond secured thereby, if no suit in equity is at the time pending, and if the defendant bring into court the amount of debt and costs; the Court will discharge him

¹ *Berger v. Hiester*, 6 Whart. 210, 214, 215.

² Rev. C. 1852, Ch. 111, §§ 55, 60.

³ 1 N. J. Laws, 412, 705; 1 Rev. Sts. 95, 917, 918, 919, 920.

⁴ Nix. Dig. pp. 525, 526, 527, 528.

(g) A. brought ejectment against B., on an equitable title, and a verdict was rendered in favor of B. for a part of the land, and in favor of A. for the residue. The jury further found that B.'s claim was under an equitable mortgage, and that it had been satisfied by the profits of the land before suit brought. A., with leave of the Court, withdrew the money tendered by him previously to bringing the suit, and paid into court, and received his bill of costs from B., the officer's costs being also paid. Held, by the Pennsylvania Act of May 5, 1841, the verdict and proceedings were not a bar to another ejectment by A. for the whole of the same premises. *Hinman v. Kent*, 15 Penn. 14. Where the *scire facias* is served on the *terre-tenant*, and there are two *nihil*s as to the mortgagor, a judgment for want of an affidavit of defence is good against the mortgagor for not appearing, and against the *terre-tenant* for not taking defence in proper form. *Stevens v. North, &c.* 35 Penn. 265.

from the mortgage, and order a reconveyance of the premises, and a delivery to the mortgagor of all evidences of title.¹

21. If a part of the debt is not due, the whole land may be sold and the whole debt paid, with a *rebate* of interest.²

22. In Georgia, upon application to the Court for foreclosure of a mortgage, the Court shall order that the debt be paid on or before the first day of the next term, the order to be served and published in a newspaper; and, if not complied with, may render judgment for the amount due, and pass a rule absolute for a sale of the land, as upon execution; the surplus proceeds, if any, to be paid to the mortgagor. If the mortgagor make affidavits of payments or set-offs, which ought to be allowed him, the Court shall refer the matter to auditors.³

23. A judgment to recover a sum of money, and that "the equity of redemption in and to certain lots of land, together with all the rights thereof, from thenceforth be barred and foreclosed, and such other proceedings be had as are pointed out in the statute in such case made and provided," is a decree for the sale of the lands, and is sufficient.⁴

24. Where a mortgage is made to secure two notes falling due at different times, if the mortgagee forecloses and sells, upon maturity of the first, and the proceeds of sale are more than sufficient to pay it; the surplus will not be held for the second note, but may be applied to other debts.⁵ The Court say: — "As to the priority of lien originally held by the mortgagee there is no dispute. The question is, whether his lien upon this fund has not been divested by his own act in taking his judgment of foreclosure. A mortgage is a specific lien upon the thing mortgaged. It extends to nothing else. Our statute has prescribed the way in which the interest vested by the mortgage in the mortgagee shall be realized and reduced to possession, which is by special judgment and

¹ 1 N. J. Laws, 162. See N. J. Laws, v. McIntosh, Geo. Decis. Part 1, 162; 1851, 342. Guerard v. Polhill, R. M. Charl. 237.

² N. J. Rev. Sts. 918-920. See N. J. Laws, 1858, 463; 1860, 159.

³ Prince, 168, 423, 424. See Willis 212.

⁴ Dickerson v. Powell, 21 Geo. 143.

⁵ Hobby v. Pemberton, Dudl. (Geo.)

sale under execution of the mortgaged premises. The effect of this judgment and sale is not to enlarge the lien, but to transfer it from the thing mortgaged to the money for which it may sell: and to this money the mortgagee is entitled, to the extent of his debt, and no further. The excess belongs to the mortgagor. But how is the extent or amount of the debt to be known? Certainly not by the mortgage, for that is sunk and lost in the higher evidence. It must be ascertained by the judgment of the Court. How far the second rule absolute or judgment of foreclosure may affect the mortgaged premises, it is not necessary or proper now to say. It certainly, however, can affect nothing but the mortgaged premises. The excess of money beyond the amount of the first judgment having been vested in the mortgagor, and so become subject to the claim of general judgments, can no more be reached by it than could any other money or property of the mortgagor."

25. Where mortgaged property, levied on under a judgment of foreclosure, is claimed by a trustee; the mortgage and judgment of foreclosure, although the mortgage recites that the property is and has been for some time in the possession of the claimant in his natural character, and although the mortgage deed is attested by the claimant as a magistrate, do not raise a *primâ facie* presumption of right and title in the mortgagor.¹

26. When mortgaged property is levied on under a judgment of foreclosure, and a claim interposed, the plaintiff in execution must prove title to the property in the defendant, at the date of the mortgage, or make out a *primâ facie* case, by proof of possession in the mortgagor at that time, before the claimant is put upon an exhibition of his title.²

27. In South Carolina, mortgagees are expressly prohibited from bringing any possessory action for the land; the mortgagor being considered owner, even after breach of condition, and the mortgagee owner of the debt. Upon the recovery of judgment on the personal security, the Judges of the Court

¹ Butt v. Maddox, 7 Geo. 495.

² Ibid.

may order a sale of the land, giving, if they see fit, a reasonable extension of time, not exceeding six months, and allowing a credit of not more than twelve months. This proceeding is to operate a perfect foreclosure. But at any time before sale the mortgagor may prevent it, and entitle himself to an entry of satisfaction on the mortgage, by paying the debt and costs.¹

28. In North Carolina, a suit may be brought on the mortgage bond or the mortgage itself, if no bill in equity is pending to foreclose or redeem. The defendant may redeem by paying the debt to the mortgagee or bringing the money into court. And the Court will order a discharge.² (*h*)

29. In Maryland, the Court is authorized by statute to decree a sale; but this is a mere cumulative remedy, which does not abrogate any preëxisting mode of relief; and therefore the mortgagee may still have a foreclosure instead of a sale. If the latter is adopted, and the property sells for less than the amount of the debt, the plaintiff cannot have a decree for the balance of the debt, for the purpose of proceeding against the person or against other property of the debtor. But the sale will be no bar to a subsequent action at law upon the debt.³ (*i*)

¹ 1 Brev. Dig. 174, 175; 5 S. C. Sts. 668. See *Eichelberger v. Harrison*, 3 Md. Ch. 39; *Ing. v. Cromwell*, 4 Md. 170.

² 1 N. C. Rev. Sts. 232.

31.

³ *Andrews v. Scotton*, 2 Bland, 667,

(*h*) Upon a bill for redemption, the Court will not order payment of the debt by a certain day, or that the bill shall be dismissed; but in default of payment, that the property shall be sold, and the surplus paid to the mortgagor. *Ingram v. Smith*, 6 Ired. Eq. 97. Whether a judgment creditor of a mortgagor can be let in to redeem the mortgage, without admitting a good title in the mortgagee, *quere*. *Tucker v. White*, 3 Dev. & Bat. Ch. 289.

(*i*) In case of a decree for sale, time must be allowed the mortgagor for payment. *Jones v. Betsworth*, 3 Bland, 194, n. The time, however, has been variously fixed, from one month to twelve or eighteen months. *Williams*, 3 Bland, 196, n. A statute of this State provided, that, in the case of an *infant* mortgagor, the Court might decree a sale or foreclosure of the property, or of enough to pay the debt. *Ibid.* n. See *Worthington v. Lee*,

30. In Mississippi, the Circuit Court has jurisdiction of bills in equity, for the foreclosure of mortgages, whatever their amount, and, in the exercise of this jurisdiction, may pass upon questions auxiliary thereto; but whether the Court

2 Bland, 678; *Lansdale v. Clarke*, 2, 358, n.; *Atkinson v. Hall*, *Ibid.*, 372; *Wardrop v. Hall*, *Ibid.*, 666; *Hunter v. Gaunt*, *Ibid.*, 667; *Buchanan v. Shannon*, *Ibid.*; *Boteler v. Beall*, 7 Gill & J. 389.

After the report of a sale by the trustee, under a mortgage executed under the Act of 1826, c. 296, is made to the county court, it has equitable jurisdiction over the case. *Wilson v. Watts*, 9 Md. 356.

An objection to a sale under the Act of 1833, c. 181. that the affidavit as to the amount due was not filed before the sale, may be taken by the purchaser before final ratification, and is fatal, even though the affidavit may be filed before the final action of the Court upon the sale, and the mortgagor may consent to its ratification. But such objection is too late after the final ratification has been duly made. *Gatchell v. Prestman*, 5 Md. 161.

Sect. 10 of St. 1825, c. 203, applies only to mortgage sales made under that act, and not to those made under St. 1826, c. 192, which are valid, although not made in the county where the land lies. *White v. Malcolm*, 15 Md. 529.

The advertisement under St. 1826, c. 192, may describe the land by its general location and number of acres, and by reference to recorded deeds. *Ibid.*

A trustee, or attorney, appointed by the mortgagees to sell, may give the bond required. *Ibid.*

The statute, requiring "twenty days' notice in two or more of the daily papers published," &c., does not require the notice to be published twenty times in each paper; but twice a week was held sufficient. *Ibid.*

The sales may be on reasonable credit. *Ibid.*

As, for one third cash, and the balance in six or twelve months, with interest and security. *Ibid.*

If the trustee makes an imperfect or no report, one being required, the sale is not to be set aside for that reason only, but he should be ordered to file one. *Ibid.*

The provision, that the parties may at any time within twenty days after the sale, file exceptions, &c., does not restrict their right to twenty days, but allows them at least that, and does not interfere with their right under chancery practice, apart from the statute, to except at any time before final ratification. *Ibid.*

St. 1826, c. 192, has not been repealed by the adoption of the present constitution. *Ibid.* *Eichelberger v. Hardesty*, *ib.* 548.

would have jurisdiction of such bill, where it would be first necessary to settle conflicting rights of judgment-creditors of the mortgagor, and those claiming under the mortgage, is doubtful.¹

31. In Florida, a mortgagee files a petition to foreclose four months before sitting of the Court. Judgment is rendered for the debt, and an absolute foreclosure, at the first term. If the defendant is absent, an advertisement is required. The act is not to interfere with the jurisdiction of the Court of Equity.²

32. A., the mortgagee of land from B., petitioned in the Circuit Court of Florida, for a foreclosure. B. acknowledged service, and also agreed that a decree should be rendered, foreclosing the mortgage, upon the back of the petition. A decree for foreclosure was made, and execution ordered against the specific property mortgaged. Held, the Circuit Court had jurisdiction of the subject-matter, and the acknowledgment of service was a compliance with the statute requiring personal service; but that execution should not have been ordered against the specific property. Also, that the description was sufficiently certain, by reference in the decree to the deeds of mortgage on record.³

33. In Texas, any party entitled to foreclose a mortgage may present a petition, describing the debt and the property mortgaged. The mortgagor shall be summoned to appear at the next court, and show cause why the petition shall not be granted. Unless the debt is paid, judgment shall be rendered for the sum due, and an order passed for a sale. The surplus proceeds shall be paid to the mortgagor. Provision is made for a trial of the rights of the parties, in case of any dispute.⁴

34. It is the general right of the defendant to be sued in his own county; but to foreclose a mortgage, he may be sued in the county where the land is situated.⁵

¹ *Bibb v. Martin*, 14 S. & M. 87.
See Miss. Rev. Code, 1857, ch. 62, art. 48.

³ *Shepard v. Kelly*, 2 Flor. 634.

⁴ Hartl. Dig. 766, 767.

⁵ *Kinney v. McCleod*, 9 Tex. 78.

² Thoms. Dig. 380.

35. In Alabama, in case of sale by order of Chancery upon an incumbrance, one claiming under the mortgagor, but not a party, may redeem within five years.¹ A mortgagor has the same right of redemption as an execution debtor. Provided, the defendant in the execution, if in possession at the time of the sale, shall deliver it without suit to the vendee. An execution creditor, whose debt is unsatisfied, may redeem, as in other cases of execution sale. One who redeems is bound to pay the occupant for his improvements.² (*j*)

36. On a bill to foreclose, the Court can only decree a sale or foreclosure; and the balance of the debt must be pursued at law.³

37. But, to entitle the mortgagee to recover such balance, there must be a distinct covenant in the mortgage to pay the debt, or a separate bond or note, or other evidence of the debt.⁴

38. A mortgage of lands in Alabama, to the United States Bank in Pennsylvania, may be foreclosed in Alabama.⁵

39. The right of redeeming within two years, after a sale under a mortgage, can be enforced only in equity. A tender does not restore the legal title.⁶

40. In Michigan,⁷ where a mortgage is payable by instalments, and the land consists of a single eighty-acre lot or a farm, and a sale becomes necessary for any but the last instalment; portions may be sold as nearly square, and as near to the northeast corner, as possible. A mortgage payable by instalments is to be treated like distinct mortgages.⁸ In case of foreclosure, the sheriff immediately makes a deed to the purchaser, which is left with the register of deeds, and after

¹ Clay, 329.

² *Ib.*, 503.

³ *Hunt v. Lewin*, 4 Stew. & Port. 138.

⁴ *Ibid.*

⁵ *Hitchcock v. U. S. &c.* 7 Ala. 386.

⁶ *Smith v. Anders*, 21 Ala. 782.

⁷ Mich. Stat. 1839, 227. See *Albany, &c. v. Stevens*, Walk. Ch. 6; *Mundy v. Monroe*, 1 Mann. 68.

⁸ Mich. Stat. 1839, 228.

(*j*) In this State, a late statute provides, that a mortgage shall "take effect" only from the time when it is delivered to be recorded. Ala. L. 1849-50, 68. See *Creighton v. The Planters', &c.* 3 Ala. 156.

one year delivered to the grantee (or after two years, unless the mortgage was made as security for the price of the land,) in case the mortgagor does not in the mean time redeem.¹ If the land consists of distinct lots, they are separately sold, and only enough of them to satisfy the claim. A deed is made by the officer, and recorded; and, unless the debtor redeem in two years, paying 7 per cent. interest, is delivered to the purchaser.² By late statutes, all bills for the foreclosure or satisfaction of mortgages shall be filed in the Circuit Court in chancery of the county where the premises, or any part thereof, are situated.³ No action of ejectment for the recovery of mortgaged premises, until the title becomes absolute upon a foreclosure.⁴

41. Where, in a foreclosure by advertisement, under the statute, a mistake occurs, which renders the proceedings irregular and voidable, the mortgagee has a right to waive them, and commence *de novo*, by advertisement, or by a bill in chancery.⁵

42. A purchaser under a statutory foreclosure, in order to recover the land after the equity of redemption has expired, must prove the regularity of all the foreclosure proceedings.⁶

43. A statute of 1840 provides for redemption after a foreclosure sale, by payment to the register of deeds. Under this statute, he alone is authorized to receive the money and destroy the deed. Nor can he even receive a check for the amount, so as to bind the purchaser.⁷

44. Where a bill is filed to foreclose a mortgage against a non-resident mortgagor, who does not appear, if the premises are insufficient to satisfy the debt, the complainant must have recourse to his remedy at law for the balance, and the Court has no power to issue execution thereon.⁸

45. Under the statute regulating the terms on which non-resident defendants, in mortgage cases, are permitted to

¹ Stat. 1840, 146.

² Stat. 1844, 38; Rev. Stat. 500-

503.

³ Laws of Michigan, 1861, p. 54.

⁴ Comp. L. Michigan, 1857, p. 256.

1241.

⁵ Atwater v. Kinman, Harring. Ch.

255.

⁶ Caswell v. Ward, 2 Doug. 374.

⁷ Woodbury v. Lewis, Walk. Ch.

256.

⁸ Lawrence v. Fellows, Ib. 468.

appear and defend, two things only are required of the defendant, namely, his appearance before the mortgaged premises are sold on the decree, and the payment of such costs as the Court shall award. The costs only are left discretionary with the Court, and, on payment of them, the defendant has a right to interpose a defence.¹

46. The statute extends to all defendants who are non-residents, and makes no distinction between mortgagors and subsequent incumbrancers.²

47. A foreclosure bill must state that something is due on the note, and whether proceedings have been had at law for the recovery of the debt.³

48. To prevent proceedings on a foreclosure bill, it is not necessary that judgment shall have been rendered on the bill or note accompanying the mortgage, but for the money for which the mortgage was given.⁴

49. In Arkansas, the mortgagee files a petition, upon which a sale is ordered, like that on other executions. If the property proves insufficient, a new execution issues, on which other property may be taken. The officer gives a certificate, which is acknowledged and recorded. Before a sale takes place, the property may be redeemed.⁵ Where real property and horses had been mortgaged, and the real estate sold under a prior lien, and the horses had died in possession of the mortgagor; on a petition to foreclose, it was held, that the Court of Chancery had power to render judgment *in personam* against the mortgagor for the debt and interest, and issue execution therefor.⁶ (k)

50. In Illinois, the remedy of *scire facias* may be had upon a mortgage. If the debt is payable by instalments, the last

¹ Bailey v. Murphy, Walk. Ch. 305.

² Ibid.

³ Bailey v. Gould, Ib. 478.

⁴ Dennis v. Hemmingway, Ib. 387.

⁵ Ark. Rev. Stat. 580.

⁶ Price v. The State, &c. 14 Ark. 50.

(k) As to foreclosure in Louisiana, see Lewis v. Labaune, 13 La. An. 382.

must be due. The land is sold, and subject to the same right of redemption as upon execution.¹ The *scire facias* is a proceeding *in rem*; by process and declaration, and open to demurrer.²

51. A statute provided, that the Court might give judgment for the amount due, and also for a sale to satisfy the judgment. In a *scire facias*, the Court gave judgment for the sum due, with directions "that a special execution issue therefor, according to the statute in such case made and provided." Held, the judgment was erroneous, the *scire facias* upon mortgage being a proceeding *in rem*; and the proper judgment being, according to the statute, to sell the premises.³

52. In this State, the remedy may be either by *scire facias* or in chancery. But a judgment in one will bar the other.⁴ The statutory *scire facias* applies only to mortgages for the payment of money; not for the delivery of specific articles, or the performance of other acts.⁵

53. The statutes providing for a sale of the mortgaged premises on a bill to foreclose, only where they will sell for two thirds of their appraised value, and for a right to redeem, apply to mortgages made before their enactment; but they do not affect the form of the decree, but only the mode of executing it.⁶

54. Under these statutes, a purchaser at a commissioner's sale is not entitled to a deed, until the time of redemption has expired.⁷

55. A sale on *scire facias* passes all the interest which the mortgagor had at the date of the mortgage. He or those claiming under him may redeem, as in other sales upon execution.⁸

56. A mortgagee may at the same time maintain an ac-

¹ Ill. Rev. L. 376; Stat. 1841, 171. See *Belingall v. Gear*, 3 Scam. 575; *Coates v. Woodworth*, 13 Ill. 654; *Waldo v. Williams*, 2 Scam. 470.

² *Fadden v. Fortier*, 20 Ill. 509.

³ *Marshall v. Maury*, 1 Scam. 231.

⁴ *State Bank v. Wilson*, 4 Gilm. 57.

⁵ *M'Cumber v. Gilman*, 13 Ill. 542.

⁶ *Delahay v. McConnel*, 4 Scam. 156.

⁷ *Ibid.*

⁸ *State Bank v. Wilson*, 4 Gilm. 57.

tion upon his bond, an ejectment for the land, and a bill to foreclose.¹

57. In an action of trespass, where the plaintiff deduced title to the premises by virtue of a sale under a *scire facias* to foreclose a mortgage, it was held, that the sheriff's return to the *scire facias*, that he made known to the mortgagor, by honest and lawful men, &c., as he was within commanded, was sufficient to authorize judgment on the *scire facias*.² Also, that, if the *scire facias* was sued out before the mortgage debt became due, that fact would have been ground for abating the suit or for reversal of the judgment, but could not be inquired into collaterally. And so of other defects in the regularity of the proceedings. As, that the judgment does not direct a special execution for the sale of the premises.³ But the return of a sheriff to a *scire facias* for foreclosure, as follows:—“Executed this 20th day of April, 1839, by reading. M. H., sheriff;” was held not to authorize a judgment by default. The Court say, (p. 576,) “The sheriff is to” make known “to the mortgagor the object of the proceeding, by reading to him the *scire facias*. Before a court is authorized to render a judgment by default, it must appear clearly and affirmatively, by the return of the officer charged by law with the service of the process, that the defendant has been regularly served. The return should show the time and mode of the service, and on whom it was made. The return states the time and manner of the service, but omits to state on whom it was made.”⁴

58. A *scire facias* to foreclose a mortgage is considered both as a process and declaration; and the proper course to take advantage of informalities, is by demurrer.⁵ It is a process *in rem* not *in personam*. Want or failure of consideration is not a good plea, nor can a set-off be relied on. If the last instalment is due, the only defences are, that the mortgage was never a valid lien, or that it has been discharged or released.⁶

¹ Delahay v. Clement, 3 Scam. 203.

² Rockwell v. Jones, 21 Ill. 279.

³ Ibid.

⁴ Belingall v. Gear, 3 Scam. 575.

⁵ Marshall v. Maury, 1 Scam. 231.

⁶ Woodbury v. Manlove, 14 Ill. 213.

59. Where a decree of foreclosure is rendered, the contract ceases, being merged in the decree, and the latter is controlled, not by the contract, but by the statute, which gives 6 per cent. interest.¹

60. Upon the principle that a Court of Chancery, having obtained jurisdiction, will retain it for the purpose of effecting complete justice between the parties; such court may, upon a bill of foreclosure, decree a sale of the premises, and thus pass a title to the purchaser; and it will put him in possession, without driving him to an action of ejectment.²

61. Where the decree of foreclosure directs the mortgagor or party in possession to surrender it to the purchaser, the Court, upon an affidavit of service of such order, with a demand and refusal of possession, will issue a writ of execution of the order to put the purchaser in possession. But where the decree contains no such order, the Court, on motion, will pass it, and upon like service and demand will, on motion, and without notice, order an injunction against the party to deliver possession, and, upon an affidavit of service, and refusal to deliver possession, a writ of assistance to the sheriff, to put the purchaser in possession, issues of course, on motion, and without notice.³

62. But it is erroneous to award a writ of *habere facias possessionem*, where the decree contained no order for delivery of possession.⁴

63. In decreeing a foreclosure, it is the duty of the Court to ascertain the amount of principal and interest due at the time of decree, either by reference to a Master, or by a computation of the Court, and to order payment of such amount.⁵

64. Only such sales are embraced by the statute allowing redemptions upon sale of mortgaged premises, as are made under decrees and judgments; such statute has no application to a trust deed.⁶

¹ Aldrich v. Sharp, 3 Scam. 261.

² Ibid. ³ Ibid. ⁴ Ibid. ⁵ Ibid. ⁶ Bloom v. Van Rensselaer, 15 Ill.

503.

65. In Indiana,¹ the mortgagee files a bill *according to the course of the common law*, upon which the Court may render an *equitable decree*, and order a sale of the land at auction. The purchaser shall take the land free from incumbrances, and not subject to redemption, and, *in all sales on execution*, the surplus proceeds shall be paid over to the debtor. But the same statute further provides,² that no sale of property on execution, by virtue of § 25, shall create any further term or estate in vendees, mortgagees, or creditors, to whom it is sold or delivered, that the estate was mortgaged for.³

66. A statute of 1824, (since repealed,) provided, that if the holder of a bond and mortgage elected to proceed first upon the mortgage, he was thereby debarred from any other remedy. But in *Youse v. McCreary*⁴ it was held, that this act did not prevent such a holder from proceeding first upon his bond, selling the mortgaged premises on execution, and thus electing to abandon the mortgage, and giving the purchaser a clear title to the property. So in *Markle v. Rapp*⁵ it was held, that one holding a bond and mortgage might proceed first by an action on the bond, and subject all the debtor's property to his judgment, without abandoning his lien on the mortgaged premises, unless he took them on execution.

67. Debt on a promissory note. Plea, that the defendant had mortgaged land as security; that the plaintiffs had obtained a decree of foreclosure and sale; and that the defendant had sued out a writ of error to the decree, which was still pending. On demurrer, held, the plea was bad.⁶

68. By the statute of 1831, where a mortgage debt was payable by instalments, a bill of foreclosure would not lie till the day of payment of the last instalment was past.⁷ (*l*)

¹ Ind. Rev. L. 241, § 25.

² *Ib.* 241.

³ See *Slaughter v. Foust*, 4 Blackf. 281; *Shaw v. Hoadley*, 8 Blackf. 165; *Grimes v. Doe*, *Ib.* 371; *Morgan v.*

Woodward, 1 Smith, 321; *Hough v. Doyle*, 8 Blackf. 300.

⁴ 2 Blackf. 215.

⁵ *Ib.* 268.

⁶ *Brown v. Wernwag*, 4 Blackf. 1.

⁷ *Hough v. Doyle*, 8 Blackf. 300.

(*l*) In a suit for foreclosure, commenced when the first only of several

69. The interest of a holder of a certificate of canal lands is the subject of mortgage; and to a bill to foreclose such mortgage, the canal commissioners need not be made parties; and a decree for the complainant need not direct that the certificate be delivered to him.¹

70. It has been formerly held, that a bill for foreclosure must state whether any and what proceedings at law have been commenced to recover the debt.² But under the revision of the Code of 1852 such averment need not be inserted in a complaint to foreclose; if there have been any proceedings, they are to be set up in defence.³

71. Upon foreclosure, the statute authorizes a sale of the rents and profits, and the sheriff must offer them for sale. But, in the advertisement, he need not state that the rents and profits would be first offered.⁴

72. A sale upon foreclosure by a commissioner cannot certainly be attacked collaterally.⁵

73. The decree must set forth that proceedings had been taken at law to recover the debt.⁶

74. In Ohio, for the purpose of foreclosure, the land is appraised as for sale on execution, and, if two thirds of the valuation exceed the debt and interest, sold at auction, and the surplus proceeds paid over to the mortgagor. If not, the absolute title is transferred to the mortgagee, with no right of redemption. In the latter case, he may still recover the balance of his debt.⁷ The proceedings in chancery are said to be *in rem*.⁸ A bill in equity to foreclose may be sustained, as well as the statutory *scire facias*.⁹

¹ Miller v. Tipton, 6 Blackf. 238.

² McMellen v. Furnass, 1 Cart. 160.

³ Newton v. Newton, 12 Ind. 527.

⁴ Brownfield v. Weicht, 9 Ind. 394.

⁵ Wilkins v. De Pauw, 10 Ind. 159.

⁶ Edwards v. Hough, 5 Ind. 149.

⁷ Walk. 303. See Heighway v. Pendleton, 15 Ohio, 735; 1 Harn. 235;

Higgins v. West, 5 Harn. 555.

⁸ Frische v. Kramer, 16 Ohio, 141.

⁹ 1 Harn. 235.

mortgage-notes had fallen due, judgment for the sale of the entire mortgaged premises is erroneous, unless it appear by the record that the Court inquired whether the land could be sold in parcels, and that provision was made for the notes not due. Cubberly v. Wine, 13 Ind. 353; Wainscott v. Silvers, Ib. 497.

75. In the same State, it is said, the mortgagee may have a decree of foreclosure, where the debt equals two thirds of the value of the land; and he may demand a sale.¹ (*m*)

76. A purchaser from the mortgagor, after the mortgage, cannot redeem against a purchaser at a judicial sale under the mortgage.²

77. If an equitable interest in lands be mortgaged, the lands afterwards sold by order of Court, and part of the proceeds paid to a third party, whose claim is prior to that of the mortgagee, the latter has a lien for his debt on the remainder.³

78. A purchaser at sheriff's sale, under an order for the sale of mortgaged premises, acquires the mortgagee's interest, and is subrogated to his rights in the land.⁴

79. After condition broken, a *scire facias* on a mortgage, in 1808, might legally issue against the administratrix.⁵

80. After judgment by *scire facias*, the lands must be sold according to the law in force when the judgment was obtained, not when the mortgage was executed.⁶

81. A judgment by *scire facias* on mortgage, in 1808, ordered "that the plaintiffs recover their debt and damages, and have execution therefor," not specifying the amount of the judgment or the sum for which execution should issue. Held, such judgment was reducible to certainty and valid, when collaterally called in question.⁷ (*n*)

82. In Missouri, where the debt exceeds fifty dollars, the

¹ 4 Kent, 481, n.

² Lytle v. Reed, Wright, 248.

³ Ives v. Commissioner, &c. Ib. 626.

⁴ Frische v. Kramer, 16 Ohio, 125.

⁵ Heighway v. Pendleton, 15 Ohio, 735.

⁶ Ibid.

⁷ Ibid.

(*m*) Where the mortgage only waives an appraisement and the note does not, a valid foreclosure may be made without appraisement, so far, at least, as the mortgaged premises are concerned. Harris v. Makepeace, 13 Ind. 569.

(*n*) In Ohio, by a late statute, a sale shall in all cases be ordered. When the land is situated in two or more counties, the sheriff of each county shall be ordered to make sale of the lands in his county. Laws of Ohio, 1859, p. 54.

mortgagee may file a petition against the mortgagor and the tenant, to which any person interested may be a party. Judgment is rendered for the debt, &c., and an order passed for a sale of the property. If this is insufficient, execution may issue against other property. If payment is made to the officer, he gives a certificate which is recorded.¹

83. If a mortgagee proceeds under the statute, and the whole land is sold in satisfaction of part of the debt, the rest not being due; he cannot afterwards proceed against the same lands in the hands of a purchaser, for payment of the balance.²

84. Proceedings to foreclose, under the statute, are at common law, and are not governed by rules in chancery.³ Hence, though it does not appear that process was served on the mortgagor, yet, if he appear by attorney, and enter his plea, on which issue is taken and tried, the want of service cannot be objected to; and if judgment is rendered against the mortgagor, and the mortgagee purchases at the sale, he acquires a valid title.⁴

85. The statute gives the mortgagee, on failure of the mortgagor to pay, the right of recovering only his debt and damages.⁵ But a bill in equity may be sustained, for the balance of the purchase-money due to the mortgagee, after sale of the mortgaged premises under a decree.⁶

86. Where a judgment, in proceedings to foreclose, awards a general execution against lands and goods, it is decisive as to the question of the proceeding being under the statute and not in equity.⁷

87. A mortgage does not merge in a statutory judgment of foreclosure.⁸

88. In Kentucky, it is said, "Here the mortgagee has, without the mortgagor's concurrence, three general remedies: 1st. To take possession of the mortgaged property, and apply

¹ Misso. Stat. 409, 410. See Ayres v. Shannon, 5 Mis. 282.

² Buford v. Smith, 7 Mis. 489.

³ Carr v. Holbrook, 1 Mis. 241.

⁴ McNair v. Biddle, 8 Mis. 257.

⁵ Mullanphy v. Simpson, 3 Mis. 492.

⁶ Scott v. Jackson, 2 Mis. 104.

⁷ Riley v. McCord, 24 Mis. 265.

⁸ *Ib.* 21 Mis. 285.

the profits to the extinguishment of his debt; 2d. To sue in a court of common law, and enforce his judgment either by execution, or by filing a bill and obtaining a decree for subjecting the mortgaged estate by sale to the satisfaction of his judgment; and, 3d. By filing his bill in the first instance for a foreclosure of the equity of redemption and a sale of the mortgaged property, or so much as shall be necessary.”¹

§9. The Circuit Court of any county, in which part of the mortgaged land lies, has jurisdiction of a bill for sale of the land.²

§9 *a*. In Iowa, foreclosure is obtained by civil action in the district court. If anything be found due, the Court shall render judgment therefor, and direct the property, or so much as is necessary, to be sold, to satisfy the amount due, with interest and costs. A special execution shall issue accordingly. If the property does not sell for sufficient to satisfy the execution, a general execution may be issued against the mortgagor, unless the parties have stipulated otherwise. If separate suits are brought on the bond or note and on the mortgage, the plaintiff must elect which to prosecute. The other will be discontinued at his cost. When a judgment is obtained in an action on the bond, the property mortgaged may be sold on the execution, and the judgment shall be a lien thereon from the date of the recording of the mortgage. The mortgagor, or any other person having a lien on the mortgaged premises, or any part thereof, may redeem the same after sale, within the same time and on the same terms as are provided in chapter 125, in cases of real estate sold on ordinary or general execution. At any time prior to the sale made in either of the above modes, a person having a lien on the property, which is junior to the mortgage, may have an assignment of all the interest of the mortgagee, by paying him the amount secured, with interest and costs, together with the amount of any other liens of the same holder which are paramount to his. He may then proceed with

¹ Per Robertson, C. J., *Caufman v. Sayre*, 2 B. Mon. 207.

² *Owings v. Beall*, 3 Litt. 103.

the foreclosure, or discontinue it at his option. If there is an overplus remaining after satisfying the mortgage and costs, and if there are no other liens upon the property, such surplus shall be paid to the mortgagor. If there are any other liens on the property sold, or other payments secured by the same mortgage, they shall be paid off in their order. And if the money secured by any such lien is not yet due, a suitable rebate of interest must be made by the holder thereof, or his lien on such property will be postponed to those of a junior date; and if there are none such, the balance will be paid to the mortgagor. As far as practicable, the property sold must be only sufficient to satisfy the mortgage foreclosed in either of the methods aforesaid.¹

89 *b*. Where a petition to foreclose asks a judgment on the note and a foreclosure, there is no union of law and equity in the proceeding, and the judgment prayed for is authorized by § 2084 of the Code.²

89 *c*. On a proceeding to foreclose or sell, execution must issue forthwith upon the judgment. The Court cannot order it to be stayed.³

89 *d*. Where, in a proceeding to foreclose, under the Code, c. 118, judgment was entered for the amount found due, ordering a foreclosure, and awarding a special execution against the property; it was held, that the judgment did not cut off the right of the defendant to redeem before the sale, under the special execution, and followed substantially the provisions of the Code.⁴

89 *e*. Where the maker of the note and the mortgagor are not the same person, under the Code, § 2085, in the absence of special agreement, the mortgagor is liable for the debt secured, and if the land mortgaged will not suffice, a general execution may issue against him.⁵

89 *f*. In such case the non-joinder of the promisor in a

¹ Iowa Rev. Sts. 1860, p. 65.

⁴ Duncan *v.* Hobart, 8 Clarke, 337.

² Corley *v.* Hobart, 8 Clarke, 358.

⁵ Deland *v.* Mershon, 7 Clarke,

³ Carroll *v.* Reddington, 7 Clarke, 70.

suit to foreclose is no ground of demurrer, even if it is a defect.¹

89 *g.* The cause of action begins upon an entry for foreclosure, followed by possession.²

90. In Wisconsin, upon a bill for foreclosure, a sale is ordered, with a decree against the mortgagor to pay the balance of the debt. After the filing of a bill, no suit at law can be brought for the debt, unless authorized by the Court of Chancery. If any other party is liable for the debt, he may be made party to the bill, and a decree rendered against him. The bill must set forth whether there have been any proceedings at law, and any payment on the mortgage. If a judgment has been recovered at law, there shall be no further proceedings, except upon the officer's return on the execution. The sheriff sells the land in his county; and his deed passes the same title, as would be acquired by a foreclosure, or by a deed from mortgagee and mortgagor, and binds all parties. From the proceeds the debt is paid, the surplus brought into court, and distributed to parties entitled to it. After three months, the money shall be placed at interest. If other instalments become due after commencement of suit, they may be brought into the decree. The defendant may bring into court the sum due, with costs, at any time before sale, and the bill be dismissed. If this is done after the decree, the proceedings will be stayed, but the decree will remain in force, to be the foundation of a subsequent petition. The land shall be sold in separate parcels, if the interest of the parties requires it.³ (*o*)

¹ *Dequid v. Mershon*, 7 Clarke, 70.

² *Wiscon. Rev. Stats.* 423-425. See

³ *Montgomery v. Chadwick*, 7 Clarke, *Wiscon. L.* 1859, p. 240; 1857, p. 19.

(*c*) A tender of the amount of the decree made before the sale will stop or avoid it, but it must be a tender, not a mere offer. *Babeock v. Perry*, 8 Wis. 267.

The Court will not set aside a foreclosure sale, and thereby do practical injustice to the other party, on account of the laches and gross negligence of the defendant. *Ibid.*

91. By later statutes, in all proceedings at law hereafter commenced under that portion of chapter 84 of the Revised Statutes, entitled, "of the powers and proceedings of courts in chancery on bills for the foreclosure or satisfaction of mortgages," the defendant shall have six months to answer, after the service of summons or publication of notice. Whenever judgment shall be entered, or an order made for the sale of mortgaged premises, there shall be six months' notice of such sale, as hereinafter provided; and in all cases where, before the passage of this act, judgment has been rendered, in an action to foreclose, or an order or decree made for a sale of the premises, they shall be sold only upon six months' notice, which notice shall be given in the manner provided in this act for giving notices of the sale of mortgaged premises. It shall be the duty of the officer appointed to make sale of the premises, immediately after receiving a copy of the order, to publish or cause to be published notice of the sale (unless otherwise ordered by the Court), describing the premises as now required by law, in some newspaper of general circulation in the county in which such premises are situated, at least once in each month, for six months; and if there be no newspaper in the county, then in an adjoining county; otherwise the sale shall be invalid.¹

92. In all sales of mortgaged premises under any judgment of foreclosure, it shall be the duty of the officer, within ten days after the sale, to execute to the purchaser a certificate of sale in writing under seal, setting forth each tract, the sum paid therefor, and the time when the purchaser shall be entitled to a deed, unless the same shall be redeemed as hereinafter provided; and such officer shall also within ten

¹ Wisc. L. 1858, p. 134.

An appeal undertaking by the mortgagor in a foreclosure suit, which does not expressly provide, with sufficient security, that there shall be no waste, and that the appellant shall pay for the use of the property during the appeal if judgment should be against him, will not operate to stay proceedings on the judgment for foreclosure. *Pierce v. Kneeland*, 7 Wisc. 224.

days file, in the office where the mortgage was recorded, a duplicate of such certificate signed by him, and such certificate, or a copy properly certified by the register, shall be evidence of the facts. The mortgagor or his heirs, executors, administrators, or assigns, at any time within one year after such sale, may redeem such lands, or any distinct tract or parcel thereof, separately sold, by paying the price to the purchaser, his executors, &c., or the officer, or his successor in office, with interest at the rate of ten per cent. per annum, and upon such payment the officer shall execute a certificate under seal of such redemption, which shall discharge the mortgage, and all the title acquired by the purchaser. The mortgagor or his assigns may retain possession of the premises, in trust for the mortgagee or purchaser, until the title shall absolutely vest in the purchaser. If redeemed, the officer or his successor shall execute to the purchaser deeds of the land, which shall vest in the purchaser the same estate as if executed by the mortgagor and mortgagee, and shall constitute an entire bar against all parties to the action and their heirs respectively, and all persons claiming under them. A subsequent mortgagee or other incumbrancer may redeem or satisfy the prior mortgage, and shall thereby acquire all the rights of the prior mortgagee. Every decree of foreclosure shall require the premises to be sold, and the equity of redemption shall not be foreclosed without such sale, except by consent of parties, in open court. Chapter 113 of the general laws of 1858 shall not apply to the foreclosure of mortgages executed after the passage of this act.¹

93. In Minnesota, where a mortgage contains a power of sale, there may be a foreclosure by means of a public advertisement, after such a default as the power refers to. But not where a suit has been brought for the debt, unless it has been discontinued, or an execution returned unsatisfied in whole or in part; nor unless the mortgage and all assignments of it have been recorded. Where a mortgage debt is payable by instalments, each, after the first, shall be consid-

¹ Laws of Wisconsin, 1859, p. 217.

ered as a separate mortgage; and a foreclosure may be had, as if there were a separate mortgage for each instalment, and a redemption by the mortgagor shall have the like effect as if the sale for such instalments had been made upon an independent prior mortgage. Where distinct parcels of land are included in one mortgage, they shall be sold separately. And only enough shall be sold to pay the amount due. The mortgagee may purchase the land. Upon a sale for foreclosure, a certificate is first given; and, unless the property is redeemed within a year, a deed. The mortgagor is not entitled to possession after the sale. The surplus proceeds of sale are paid to the mortgagor, &c. A subsequent mortgagee may redeem. If the mortgagee himself purchases, no deed is necessary, but the affidavits of sale will be sufficient, and have the same effect as a conveyance by the mortgagee to a third person. A mortgagee may file a bill in equity for foreclosure or satisfaction. A sale of the property will be ordered, but not within nine months after filing the bill. A decree may be had for payment of the balance remaining due after a sale, and execution will issue therefor. After the filing of a bill, while it is pending, and after a decree, there shall be no suit at law to recover the debt, unless expressly authorized by the Court. If a third person is liable for the debt, he may be made party to the bill, and a decree rendered against him to pay the debt. The bill must allege whether any proceedings have been commenced at law, and whether any part of the debt is paid. It does not lie, if a judgment at law has been recovered, unless an execution has been returned unsatisfied, and the return states that the party has no property except the land. A deed is made by a Master in Chancery, or other person appointed by the Court. A purchaser takes the same title as the mortgagee would acquire upon foreclosure, or as if the mortgagee and mortgagor joined in conveying; and they, and all parties to the suit, their heirs and those claiming under them, will be barred. In case of a suit for non-payment of an instalment, the defendant may stop it by bringing into Court the debt and cost. Otherwise, the case may be referred to a Master. If

a part of the property will be sufficient to pay the debt, such part shall be sold, and the decree will remain as security for future instalments, to be enforced upon a new petition. If deemed expedient, the whole shall be sold, and the whole debt paid, with a rebate of interest for what is not due ; or the money may be invested by the Court.¹

94. In California, on a decree of sale upon foreclosure, if the debt is not all due, only sufficient property is sold to pay the amount due ; and as more of the debt accrues, the Court on motion may order more property to be sold. If the property cannot well be divided, the whole may be sold in the first instance and the entire debt paid. If the property is not sufficient to pay the debt, execution may issue for the balance.²

94 *a.* Actions for the foreclosure of mortgages must be tried in the county in which the subject of the action, or some part thereof, is situated.³ In this State, there is no technical foreclosure, though the decree be so expressed, but a sale of the property. As in case of the lien of other judgments, the purchaser's title relates to the date of the mortgage. Any surplus proceeds belong to the mortgagor, and for any deficiency the mortgagee has a general execution.⁴ Upon a sale of foreclosure, the sheriff does not give a deed nor possession of the land.⁵

94 *b.* Judgment may be rendered for the amount of the mortgage-note, personally, as well as for a sale of the property.⁶

94 *c.* Practice Act, § 32, authorizing judgment against the joint property, where only some of the defendants have been served, has no application in the case of a foreclosure of a mortgage executed by more than one. Though they joined in the mortgage, the presumption is, that the land was held in common, not jointly.⁷

¹ Minnes. Rev. Stats. 434, 437, 469, 470. See Stats. 1858, ch. 61.

² Cal. Dig. 200.

³ Vallejo v. Randall, 5 Cal. 461.

⁴ McMillan v. Richards, 9 Cal. 365.

See Emeric v. Toms, 6 Cal. 155 ; Nagle v. Macy, 9 Cal. 426.

⁵ Harlan v. Smith, 6 Cal. 173.

⁶ Rollins v. Forbes, 10 Cal. 299 ;

Rowe v. Table, &c. Co. Ib. 441.

⁷ Bowen v. May, 12 Cal. 348.

94 *d.* A writ of assistance is the appropriate remedy to place in possession the purchaser at a foreclosure sale, after he has obtained his deed.¹

94 *e.* A preliminary order to admit the purchaser must first be made either by the original decree or by a special order, that the default of the tenant may be properly established, and thereupon the writ may issue.²

95. In Massachusetts, New Hampshire, Maine, and Rhode Island, the remedy of the mortgagee is by *ejectment* to recover the land. In all real actions upon mortgage, after breach of condition, the judgment shall or may be a conditional one, that if the mortgagor, &c. pay to the mortgagee, &c. the sum adjudged due, within two months, no writ of possession shall issue ; otherwise such writ shall issue.

96. In Massachusetts, such judgment must be moved for by one of the parties ; in Rhode Island by the defendant ; and in Massachusetts and Maine, cannot be claimed by a defendant who is not the mortgagor, and does not claim under him. In Vermont, judgment in such case is rendered in common form, but the Court, on application of the defendant, may stay execution, and order, that if he pay the amount due in time not exceeding one year, the judgment shall be vacated. Payment is to be made to the clerk, who shall give a certificate thereof, to be recorded, and also take a receipt from the plaintiff. No redemption is allowed after a writ of possession. In Maine, unless the mortgage is set forth in the writ, the judgment will be absolute, if the defendant does not claim a right to redeem.³

97. In a writ of entry founded upon a mortgage, if the declaration is general, a suggestion that it is on a mortgage, and that a conditional judgment be entered, may be filed in any stage of the proceedings, whether before or after verdict. But the defence of usury should be made separately from

¹ *Montgomery v. Tutt*, 11 Cal. 190.

² *Ibid.*

³ Mass. Rev. Stat. 634 ; (see also Mass. Gen. Stat.) N. H. L. 63 ; 1

Smith's Stat. (Me.) 163, 164 ; Me. Rev. Stat. 555 ; R. I. L. 210 ; 1 Verm. L. 84 ; Verm. Rev. Stat. 215 ; Rackleff v. Norton, 1 Appl. 274.

the suggestion or plea as to a conditional judgment.¹ Where a mortgagee is in possession under an execution, and brings an action against a disseisor to try the title; he may have an unconditional judgment.²

98. With regard to *the mode of trial* of questions concerning mortgages, it is held that *the Court* may decide any question concerning payment of the mortgage debt, without the intervention of a jury.³ But if, in a bill in equity, by a purchaser from the mortgagor, the mortgagee claim under a deed from the mortgagor, which the plaintiff alleges to be fraudulent; the Court will order a jury to try this question.⁴

100. In Massachusetts, the mortgagee, after condition broken, may recover possession by action, or may enter openly and peaceably, if not opposed by the occupant; and a continued peaceable possession for three years will foreclose the mortgage. In case of entry *in pais*, or without a judgment, a memorandum or certificate thereof is made upon the deed, signed by the mortgagor or party claiming under him, and recorded; or else a certificate of two competent witnesses, to prove the entry, is made and sworn to and recorded; and no entry is effectual for foreclosure, unless a certificate or a deposition in proof thereof is thus made and recorded.⁵ If an entry is made before breach of condition, the three years, limited for redemption, will not begin to run till such breach, and written notice that possession is thenceforth to be held for condition broken or for foreclosure; unless the mortgagee make a new entry or commence an action. The same certificate or deposition, to prove such notice or new entry, shall be made and recorded, as above provided in case of other entries.⁶ (*p*)

¹ Briggs v. Sholes, 14 N. H. 262.

² Haven v. Adams, 4 Allen, 80.

³ Parsons v. Welles, 17 Mass. 427.

⁴ Pomeroy v. Winship, 12 Mass. 514.

⁵ Mass. Rev. Stat. 634.

⁶ *Ib.* 635, 636.

(*p*) By a later statute (1852, 892), where a mortgagee has brought a suit for foreclosure or possession, the Court or any justice thereof, in term-time or vacation, may in any county issue an injunction against waste, done or

101. In Maine, an entry to foreclose shall be made by process of law, by the written consent of the mortgagor, &c., or by the mortgagee's taking open and peaceable possession before two witnesses. Foreclosure may also be effected by a public notice in the newspaper, or a notice regularly served on the mortgagor, &c.; in each case to be recorded.¹ (q)

102. After breach of condition, the mortgagee, or any one claiming under him, may obtain possession for the purpose of foreclosure, in either of the following ways, namely: First. By an action at law and a writ of possession. An abstract of such writ, stating the time of obtaining possession, certified by the clerk, shall be recorded in the registry of deeds of the district in which the estate is, within thirty days after possession obtained. Second. He may enter into possession, and hold the same by consent in writing of the mortgagor, or the person holding under him. Third. He may enter peaceably and openly, if not opposed, in presence of two witnesses, and take possession; and a certificate of the fact and time of such entry shall be made, signed, and sworn to by such witnesses, before a justice of the peace, and such written consent and certificate shall be recorded in each registry of deeds in which the mortgage is, or by law ought to be, recorded, within thirty days after the entry. Possession obtained in either of these three modes, and continued for the three following years, shall forever foreclose the right of redemption. First. The mortgagee may give notice, in a newspaper printed in the county where the premises are sit-

¹ Smith's Stat. 161, 162; Maine Rev. Stat. 555. See Stat. 1852, 226; 1862, 91.

threatened by the mortgagor, or any person claiming under him, or by his permission. The statutory provisions relating to foreclosure are held applicable only to *legal* mortgages. *Wyman v. Babcock*, 2 Curt. 386. In reckoning the three years allowed for redemption, the day of entry is excluded. *Fuller v. Russell*, 6 Gray, 128.

(q) A notice by the mortgagee after assigning the mortgage is wholly ineffectual. *Cushing v. Ayer*, 25 Maine, 383.

uated, if any, or if not, in the State paper, three weeks successively, of his mortgage, describing the premises intelligibly, and naming the date of the mortgage, and that the condition of it is broken, by reason whereof he claims a foreclosure; and cause a copy of such printed notice, and the name and date of the newspaper in which it was last published, to be recorded in each registry of deeds in which the mortgage is, or by law ought to be, recorded, within thirty days after such last publication. Second. He may cause an attested copy of such notice to be served on the mortgagor or his assignee, if he lives in the State; and cause the original notice and the sheriff's return thereon to be recorded within thirty days after such service as aforesaid; and in all cases the certificate of the register of deeds shall be *prima facie* evidence of the fact of such entry, notice, publication of foreclosure, and of the sheriff's return. The mortgagor, or person claiming under him, may redeem within three years next after the publication, or the service of the notice above mentioned, and if not so redeemed his right of redemption shall be forever foreclosed.¹

103. In case of conditional judgment, the order is, that, if the mortgagor, his heirs, &c., pay the debt with interest within two months from the time of entering up judgment, and such further sum as the Court may adjudge to be due at any future time or times within two months from the time such further sum or sums shall become due, no writ of possession shall issue, and the mortgage shall be void.² The mortgagee, or person claiming under him, in an action for possession, may declare on his own seisin, in a writ of entry, without naming the mortgage or assignment; and if it appears that the plaintiff is entitled to possession for breach of condition, the Court shall, on the motion of either party, award conditional judgment, unless it appears that the tenant is not the mortgagor, or a person claiming under him; and in that case judgment may be entered as at common law, unless the plaintiff con-

¹ Maine Rev. Sts. ch. 89.

² Stat. of Maine, 1862, p. 97.

sents to a conditional judgment. The conditional judgment shall be, that, if the mortgagor, his heirs, &c., pay to the mortgagee, his executor, &c., the sum adjudged due, with interest, within two months from the judgment, no writ of possession shall issue, and the mortgage shall be void. When the condition is for some other act than the payment of money, the Court may vary the judgment; and the writ of possession shall issue, if the judgment is not complied with within two months. If it appears that nothing is due, judgment shall be rendered for the defendant, and for his costs, and he shall hold the land discharged of the mortgage. An action on a mortgage may be brought against a person in possession; and the mortgagor, or person claiming under him, may, in all cases, be joined with him as a co-tenant, whether he then has any interest or not in the premises; but he shall not be liable for costs, when he has no such interest, and disclaims upon the record.¹

104. It has been held, that the Supreme Court has jurisdiction over mortgages, only in cases of foreclosure and redemption.² So, that in no case has it the power to decree a foreclosure; but the acts to foreclose a mortgage are, in every case, to be those of the mortgagee, or his representative.³ So, that since the statute of 1821, c. 39, a mortgage cannot be foreclosed, except by pursuing one of the modes provided by statute for that purpose.⁴

105. In a still later case it is held, that under the Revised Statutes, c. 96 and c. 125, the Supreme Court has no equitable jurisdiction of the "foreclosure of mortgaged estates."⁵ The Court say:—"The proper proceeding against him (the mortgagor) would seem to be to obtain possession of, or to foreclose the mortgage. Yet we do not understand such to be the object of this bill. And if it were, though this Court, by the Revised Statutes, c. 96, is in terms authorized to take cognizance, as a court of equity, of "suits for the redemption and foreclosure of mortgaged estates," it is believed, that the

¹ Maine Rev. Sts. ch. 89.

² Gardiner v. Gerrish, 23 Maine, 46.

³ Shaw v. Gray, 23 Maine, 174.

⁴ Ireland v. Abbott, 24 Maine, 155.

⁵ Chase v. Palmer, 25 Maine, 341.

statute concerning mortgages, c. 125, actually precludes any action of this Court, sitting in equity, on the subject of foreclosing mortgages; the provisions of that statute containing the rules which must govern in reference thereto; and none of them having reference to the action of a court of equity. The language of the statute, therefore, as to foreclosing mortgages in a court of equity, is inappropriate, and must have been introduced inadvertently, without recurring to the specific provisions enacted for the purpose."¹

106. The statute provides, that the mortgagor's written surrender of possession shall be recorded within thirty days from its date; "unless so recorded *within said time*, such entry shall not be effectual in law, for the purpose of foreclosing such mortgage." Held, a surrender not thus recorded was wholly inoperative.²

107. Under St. 1821, c. 39, an indorsement on a mortgage, giving the mortgagee possession of the premises for the purpose of foreclosure, is not sufficient for that purpose, without an actual entry.³

108. In New Hampshire, the mortgagee may hold for foreclosure, by a peaceful entry with or without legal process, after condition broken; provided, in the former case, he publish a notice; or, by remaining in possession, with notice of his purpose, if he entered before condition broken. The period of redemption is one year.⁴ By a late statute, if the mortgagee enter under legal process, the mortgage is foreclosed at the end of one year. If without process, by advertisement in the county where the land lies, or, if there be no newspaper there, in an adjoining county, three weeks successively, stating the time when possession commenced, its object, the names of the parties, the date of the mortgage, and giving a description of the land; the first advertisement to be at least six months before foreclosure. Or a mortgagee in possession may publish a similar notice, that from a time

¹ Per Whitman, C. J., 25 Maine, 345.

⁴ N. H. Stat. 1829, 529, 530; Rev.

² Southard v. Wilson, 29 Maine, 56. Stat. 246.

³ Storer v. Little, 41 Maine, 69.

fixed he shall hold for foreclosure, and foreclose by continuing in possession one year thereafter.¹

109. If the assignee of a mortgage recovers a conditional judgment against a purchaser from the mortgagor, and executes a writ of possession, and the latter thereupon becomes tenant to the former, agreeing to pay him rent; one year's possession of the tenant will foreclose the mortgage.²

110. A written acknowledgment by the mortgagor, that he "surrenders the premises," is insufficient.³

111. In Rhode Island, three years' possession is sufficient for foreclosure. Possession is taken, either by legal process, or by peaceable and open entry in presence of two witnesses, who shall certify the fact. The party giving possession shall acknowledge it to be voluntarily done before a magistrate, and both the certificate and acknowledgment shall be recorded. The Court are empowered to hear in equity all bills of foreclosure, brought after the mortgagee has taken possession, by consent of parties, without legal process.⁴

112. The Supreme Court may allow the redemption of any mortgaged estate after a possession of twenty years, obtained without legal process, if any peculiar circumstances shall, in the opinion of the Court, render such redemption equitable.⁵

113. All mortgages of real estate, made before the digest of 1822 took effect, shall be entitled to six years' redemption, as provided in said last-mentioned digest.⁶

114. Under the expression, "continued the same during said term," where, after surrender of possession to the mortgagee, pursuant to the statute, the owner of the equity of redemption made absolute conveyance of a portion of the mortgaged premises; held, this conveyance was not such a disseisin or interruption of the possession, as would give a right to redeem after three years from its commencement.⁷ But three years' possession under the statute, in order to

¹ Sts. 1854, 1428.

² *Deming v. Comings*, 11 N. H. 474.

³ *Hobson v. Roles*, 20 N. H. 41.

⁴ R. I. Laws, 211; Rev. Sts. 1857, p.

⁵ R. I. Rev. Sts. 1857, p. 340.

⁶ *Ibid.*

⁷ *Daniels v. Mowry*, 1 R. I. 151.

operate a foreclosure, must be accompanied throughout by a right on the part of the mortgagor to redeem and prefer a bill for that purpose.¹

115. In Vermont, when a bill in equity is brought by the mortgagee, the mortgagor is allowed by the decree a definitive time, sometimes one and two years, to redeem, and in default the equity of redemption is foreclosed.² One year and one week has been adopted as the time.³ By a late statute, foreclosure may be effected by a summary petition; upon which the Court may order that payment be made to the clerk, or the mortgage foreclosed; in which case, the same title vests in the plaintiff as if he had received an absolute deed. This remedy does not supersede the former one; but in case of default, the costs are limited to the amount allowed upon a petition.⁴

116. If, after the law day has passed, and pending a suit for foreclosure, a third person, by permission of the mortgagor, erect a building on the land, and the mortgagee come into possession under a decree of foreclosure; the builder has no right to remove such erection.⁵ (*r*)

117. In Connecticut, the land mortgaged, upon foreclosure, is never decreed to be sold. Chancery will decree a foreclosure, where the value of the estate does not exceed the debt,

¹ *Daniels v. Mowry*, 1 R. I. 151.

³ *Langdon v. Stiles*, 2 Aik. 184.

² *Smith v. Bailey*, 1 Shaw, 163; *Ibid.*

⁴ *Sts.* 1852, 9-11.

267; 4 Kent, 181.

⁵ *Preston v. Briggs*, 16 Verm. 124.

(*r*) By a late statute, in cases of foreclosure, either at law or in chancery, the party procuring such foreclosure to cause a copy of the decree, shall be recorded in the town clerk's office where the land is situated, within thirty days after the expiration of the time of redemption.

Such foreclosure shall not transfer the title as against subsequent purchasers, mortgagees, or attaching creditors, unless this provision is complied with, or, unless such decree is thereafter left for record, prior to the acquiring of any adverse title, and such subsequent holder may redeem. *Laws of Vermont*, 1859, p. 21.

The provisions of *Comp. Sts. c. 38, §§ 7-12*, relating to redemption, do not apply where the condition is, to make a cellar, finish and paint a house. The remedy in such case is in equity. *Harrington v. Donaldson*, 31 Verm. 535.

cost, and repairs. The bill of foreclosure is not a proceeding *in rem*; there is no sale, and possession is not enforced. The mortgagor has fifteen years to redeem, after entry for breach of condition. Where, before foreclosure, suit has been brought on the note, the costs become part of the mortgaged debt. An action upon a mortgage before it is due is defeated by a tender of debt and cost. If a part only is due, a tender of that amount defeats the action, and stops the interest.¹ By a late statute, in case of foreclosure by a party not having the legal title to the land, but entitled to the money secured by the mortgage; the title vests in him after the right of redemption has expired, upon the recording of the decree in the town where the land lies. In case of foreclosure by an executor, &c., or trustee, the property shall be applied as the money would have been.²

118. When a mortgage has been foreclosed in any court, and the right of redemption lost; the owner of the land shall forthwith make a certificate, describing the premises, the mortgage, the book and page where it is recorded, and the time when the title became absolute, which certificate shall be signed by the party or his agent, and recorded in the town where the property is situated. Upon failure to comply with this provision within one month, a penalty is incurred of ten dollars.³ The conservators of records may release a mortgage upon payment of the debt.⁴

¹ *Palmer v. Mead*, 7 Conn. 152, 153; *Pettibone v. Stevens*, 15 Conn. 19; *— v. Roberts*, 1 Root, 527; Conn. Stat. 1840, 30, 31; *Mix v. Hotchkiss*, 14 Conn. 32.

² Sts. 1855, 105-6.

³ Conn. L. 1849, 51, 52; *Ibid.* 1850, 34.

⁴ Conn. Stat. 1849, 26.

CHAPTER XXVIII.

STATUTORY PROVISIONS RELATING TO THE REDEMPTION OF
MORTGAGES, AND DECISIONS THEREUPON.

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| 1. Foreclosure and redemption compared, with reference to statutory provisions. | 7. Construction of the New Hampshire statute. |
| 2. Massachusetts. | 9. Decisions relating to the mode of tender and rendering an account. |
| 3. Maine. | 22. Rule as to costs. |
| 5. New Hampshire. | 25. Payment into court. |
| 6. Suit in the United States Court. | 27. Claim for rents. |

1. It has been seen (*supra*, ch. 25, § 2) that foreclosure and redemption are in many respects *correlative* rights; the one, on the part of one of the parties, implying or involving the other on the part of the other party. Having, therefore, in the last chapter, considered the statutory provisions relating to foreclosure, we propose in the present to state those relating to redemption, and the decisions thereupon. Upon this subject, however, as has been already remarked, (ch. 27, § 1,) most of the States have no enactments, except those incidentally connected with the methods prescribed for foreclosure; and the distinct regulations, which are found in some of the States, are much less numerous and minute than those concerning the remedies of the mortgagee; the course of proceeding being chiefly governed by the general principles of equity jurisprudence. In general, the proposition may be laid down that a mortgagor cannot claim redemption without a tender of the debt.¹

2. In Massachusetts, (a) a tender for the purpose of re-

¹ Hoopes v. Bailey, 28 Miss. 328.

(a) See *Sanborn v. Dennis*, 9 Gray, 208; *Wofford v. Thompson*, 8 Tex. 222. In *Gray v. Jenks*, (3 Mas. 522, 523,) Judge Story makes the following remarks, as to the history of the equity of redemption in Massachusetts.

demption may be made, even before entry for condition broken. If not accepted, a tender shall not prevent foreclosure, unless a suit is brought thereon within one year. A bill for

“ It does not appear that, before the provincial charter of Massachusetts, in 1692, there was any remedy at law for the mortgagor after breach of the condition ; at least, I have not been able to trace any in the colonial ordinances. Immediately after that charter, provision was made for the erection of a High Court of Chancery, by the Act of 4 W. & M. ch. 5 ; and again, in a more complete form, by the Act of 5 W. & M. ch. 26. These statutes would have afforded the means of effectual relief ; but the equity jurisdiction not being relished in the Province, these statutes soon fell, and every subsequent effort to establish a general Court of Chancery has proved abortive. The Provincial Act of 9 Will. ch. 48, § 3, directed, that, upon satisfaction and payment of the mortgage, the mortgagee should, at the request of the mortgagor, cause such satisfaction and payment to be entered in the margin of the record of such mortgage in the Register's office, and sign the same, which should ‘ forever thereafter discharge, defeat, and release such mortgage, and perpetually bar all actions to be brought thereupon in any court of record ; ’ and in case of the refusal of the mortgagee to make and sign such acknowledgment, or otherwise discharge the mortgage and release the estate, the statute gave an action against the mortgagee for all damages for want of such discharge or release. The Act 10 W. 3, ch. 58, further provided, that, in real actions upon mortgage, the judgment should be conditional, that the mortgagor, his heirs, &c., should pay the mortgagee, &c., such sum as the Court should determine to be justly due therefor, within two months' time after judgment, for discharging the mortgage, or that the plaintiff should recover possession of the estate sued for, and execution be awarded for the same. And it was further provided, that, where the mortgagee had entered into possession of the estate, the mortgagor should, upon tender of the money due, have a right to redeem the same at any time within three years after such entry, and that a bill in equity should lie in the courts of law for this purpose. These enactments continued in force until after the Revolution, and are substantially incorporated into the existing statutes of Massachusetts on the subject of mortgages.”

With regard to the statutory requisition of a previous tender, in order to sustain a bill to redeem, Judge Story in another case (*Gordon v. Hobart*, 2 Sumn. 403,) remarks : “ Whether the State statute (requiring a tender) can be applied, except to cases where a particular and certain debt or duty is admitted to be due and unperformed, we need not inquire, though it seems difficult to conceive how it can be applied to cases where the debt or duty is wholly uncertain and indeterminate, and cannot be ascertained, but by the judgment of the Court, acting upon all the circumstances of the particular case.”

redemption, offering to pay the money due, may be brought without a previous tender; but the plaintiff shall pay costs, unless the defendant has unreasonably neglected or refused to render an account.¹ Where, after entry of the mortgage, it appears that he has not unreasonably neglected or refused to render an account, the Court, upon a bill to redeem, may award to him, in addition to the balance due on the mortgage, interest thereon, from the expiration of three years after entry, to the time of rendering judgment, at a rate not exceeding 12 per cent. a year.²

3. Substantially similar provision is made in Maine. In that State, if the mortgage is conditioned for payment of money only, the whole of which is due, after payment or tender, the mortgagor, by a bill in equity, may compel the mortgagee to give a release, if he has neglected or refused to do it, though not in possession; or he may proceed, as above provided, without a tender.³ (b) Where the mortgagee, or one claiming under him, has entered for breach of condition, the mortgagor, or any one claiming under him, may redeem within three years by bringing a bill in equity. The Court, upon a hearing, may render judgment according to equity and good conscience, and award execution accordingly; and if the defendant fails to appear, or refuses to comply with the order or judgment, the money shall be paid into court, and execution issue.⁴ Payment or tender, for the purpose of redemption, must be made to the mortgagee or vendee, or the person in possession or holding under him, that is, to the mortgagee or his assignee.⁵ (c)

¹ Mass. Rev. Stat. 636.

² Stat. 1850, ch. 21; Sts. 1853, 969; Stat. 555.

Adams v. Brown, 7 Cush. 223, 224.

³ Maine Laws, 1837, 439, 440; Rev.

Stat. 555.

⁴ 1 Smith, 159, 163.

⁵ *Dorkray v. Noble*, 8 Greenl. 278.

As to the duty of a mortgagee to state an account, after the expiration of a notice to pay off a mortgage, see *Harmer v. Priestley*, 21 Eng. Law & Eq. 496.

(b) In Massachusetts, after the mortgagor's death, only his heir or assignee can redeem. In Maine, the executor also may do it.

(c) As to the Chancery jurisdiction over mortgages, see *French v. Sturdivant*, 8 Greenl. 246.

4. If a person entitled to redeem a mortgaged estate, or an equity of redemption sold on execution, or the right to redeem such right, dies without having made a tender for that purpose, a tender may be made and a bill for redemption commenced and prosecuted by his executor or administrator, heirs, or devisees; if the plaintiff in any such bill in equity dies pending the suit, it may be prosecuted to final judgment by his heirs, &c. When the mortgagee is under guardianship, a tender may be made to the guardian. (*d*) Any person, having a right to redeem lands mortgaged, may demand of the mortgagee, or person claiming under him, a true account of the rents and profits, and money expended in repairs and improvements, if any; and if the latter unreasonably refuses or neglects to render such account in writing, or in any other way by his default prevents the plaintiff from performing or tendering performance of the condition, he may bring his bill in equity for redemption within the time limited, and therein offer to pay by law the sum found to be equitably due, or to perform any other condition; and such offer shall have the same force as a tender of payment or performance before commencement of suit. When the amount due has been paid or tendered, within the time so limited, he may have a bill in equity for redemption, though such mortgagee or his assignee has never had actual possession for breach of condition; or, without having made a tender before commencement of suit, he may have his bill in the manner prescribed by law. When the bill to redeem is brought before an actual entry for breach of condition, and before payment or tender, if the mortgagee or the person claiming under him is out of the State, and

(*d*) By a late statute, the seventeenth section of chapter ninety of the revised statutes is amended by striking out the word "three" in the fourth line of said section, and inserting the word "one," so that the bill in equity therein provided for shall be brought within one year after tender, instead of the time now allowed by law. This act shall not apply to any case where a tender has been or shall be made, prior to the time this act takes effect. Stat. of Maine, 1861, p. 8.

has not had actual notice, the Court shall order notice and continue the cause. When a mortgage is alleged and proved to be fraudulent, in whole or in part, an innocent assignee of the mortgagor, for a valuable consideration, may file his bill within the time allowed to redeem, and redeem without a tender. When the mortgagee, or person claiming under him, has commenced proceedings for foreclosure, if he resides out of the State, or if his residence is unknown to the party having the right to redeem; the latter may file his bill, and pay at the same time to the clerk of the court the sum due, which payment shall have the same effect as a tender before the suit; and the Court shall order notice of the suit. No bill shall be brought for redemption founded on a tender or performance of condition made before commencement of suit, unless within three years after such tender. In any suit for redemption, when justice requires that any person, claiming an interest in the premises, should be made a party, on motion, the Court may order him to be served with an attested copy of the bill amended in such manner as they may direct, and on his appearance, the cause shall proceed as though he had been originally joined. The Court, when a decree is made for redemption, may award execution jointly or severally, as the case requires; and for sums found due for rents and profits, over and above the sums reasonably expended in repairing and increasing the value of the estate. When money is brought into court in a suit for redemption, the Court may deduct such sum as the defendant is chargeable with on account of rents and profits or costs awarded against him; and the person, to whom a sum of money is tendered to redeem such lands, if he receives a larger sum than he is entitled to retain, shall refund the excess.¹

5. In New Hampshire, payment or tender renders the mortgage void. If the mortgagee refuse to release, or state an account, upon a written request, the mortgagor may *petition* the Court; and, upon his bringing the money into court,

¹ Maine Rev. Sts. ch. 89.

if merely tendered previously, the Court shall order a discharge, and an attested copy of the decree shall be recorded in the registry of deeds. If the mortgagee refuse to state an account, the Court shall state the amount due, and make a similar decree.¹

6. It has been held, that the statute of Maine, relating to a tender for the purpose of redemption, does not apply to suits in the United States Court, the jurisdiction of this Court being independent of State local law, and as extensive as that in England.²

7. In New Hampshire, the following judicial construction is given of the statute upon this subject. Under the statute of July 3, 1829, the mortgagor, or person entitled to redeem, may request from the mortgagee, &c. an account, including damages and costs, rents and profits, within one year of possession taken to foreclose. If the account is forthwith rendered, the right of redemption continues one year. If the account is not ready, the mortgagee is allowed time to prepare it, and the right of redemption continues till it is furnished. If furnished in reasonable time, payment must be made in one year, where the case admits it. If a year has passed before the account is rendered, payment shall be made upon, or in reasonable time after, such rendition. A petition for an account, and a decree for redemption, cannot regularly be filed, till there has been an unreasonable refusal to furnish it, unless the account is erroneous.³

8. In the same State, it is held, that if one person, having a right to redeem, can avail himself of a tender made by another in his own name, who had no such right, he must do it, and bring a bill to redeem, in reasonable time, or the tender will be considered as waived and abandoned. And eight years are an unreasonable time.⁴

9. The following cases relate more particularly to the mode of tender necessary for redemption, and the duty of the mortgagee in stating an account.

¹ N. H. Stat. 1829, 530, 531; Rev. Stat. 246.

³ *Wendell v. N. H. &c.* 9 N. H. 404.

² *Gordon v. Hobart*, 2 Sumn. 401.

⁴ *Bailey v. Willard*, 8 N. H. 429.

10. The defendant, a mortgagee, was asked by the assignee of the mortgagor, the plaintiff, at the office of the former, in Weston, what was due on the mortgage. He answered, "that he owned the whole estate;" and to a second inquiry, "that the records would show." To the question, what money would answer, he replied, "Nothing but specie; and that, if tendered, he should act his pleasure about receiving it; and, if he took it, he would discharge upon the records." Also, "that his papers were at Cambridge," (distant eight or nine miles from Weston,) "and he could not ascertain the sum due." Held, there was a sufficient demand and refusal of an account to maintain the action; but not such an *unreasonable* refusal, as to authorize a judgment against the defendant for costs.¹ (*e*)

¹ Willard v. Fiske, 2 Pick. 540.

(*c*) This case was founded upon a statute of 1821, c. 85, § 1, the language of which was:—"The bill shall be sustained without any allegation or proof of such previous tender, provided the mortgagee, &c. shall, on *request*, have refused, &c. to state his account." This proviso was repealed by Stat. 1833, c. 291. And the language of the Revised Statutes, above referred to, is:—"May bring a bill without any previous tender," not making a request for an account a condition precedent to *the suit*, but only, in the following section, to *the recovery of costs*. In the case above cited, the Court remark, (p. 542):—"The inconveniences which existed in relation to the process for redeeming mortgages before the passing of this statute, are well known to the bar. A bill could not be sustained without a tender of as much as remained due on the mortgage. As the rents and profits, which might have been received by the mortgagee, were to be accounted for, it was frequently difficult, and sometimes impossible, for the mortgagor or his assignee to ascertain the sum due. He was obliged, therefore, to make his tender at random; if the sum fell short of the balance due, and the time of redemption expired before this was ascertained, which the mortgagee might prevent until the close of the process, the estate was forfeited; if, to avoid this evil, he should tender more than was due, he ran the risk of losing the surplus. In the case of *Tirrell v. Merrill*, 17 Mass. 117, this defect in the law appeared in a very glaring light; and the statute under which this bill is brought was probably enacted to cure an existing evil, which was made so apparent by the decision of that case."

In the case referred to, the Court say, (p. 121):—"A bill to redeem

11. A mortgagor requested the mortgagee, when absent from the town where the latter resided, to make out and furnish in reasonable time an account of the sum due. He replied, "that if the mortgagor would call upon him at home, he would furnish all the information in his power." Without making such application, the mortgagor brings the present bill to redeem. Held, the bill should be dismissed with costs.¹

12. To a demand for an account, the mortgagee replied, "that he had no other account to render than one rendered two years before;" which account proved to be erroneous. Held, this was a sufficient demand and refusal to sustain a bill for redemption.² Per Wilde, J. : ³ — "The defendant expressly refused to render an account, except by reference to one which had been stated in 1823, which he said was correct. It appears by the evidence that this account is, in several particulars, incorrect, so that there was a refusal to render a true account, and whether it was caused by mistake or otherwise, is immaterial. If the defendant wished for time to prepare a new account, he should have expressed

¹ *Fay v. Valentine*, 2 Pick. 546. ² *Battle v. Griffin*, 4 Pick. 6. ³ *Ib.* 15, 16.

must set forth a payment, or tender of payment, of the sum due; and the averment must be supported by evidence. It is true the mortgagor or his assignee may be subjected to inconvenience by reason of his not knowing the amount of rents and profits, or the expense of repairs. But the statute gives him no remedy. He must make the best calculation he can, and tender at his peril. If he should tender more than is due, and the mortgagee should receive it, *possibly* an action would lie to recover back the excess, as paid by compulsion; provided he calls on the mortgagee for an account, and he refuses to give one." So, in *Putnam v. Putnam*, (13 Pick. 130,) the Court say: — "The plaintiff must aver a payment or tender of the full amount due; or that he has requested of the defendant an account, and that the defendant has refused or neglected truly to state his account. It is a condition precedent, and cannot be dispensed with. And the proof must support the averment in either case. In the former, a tender of the amount must be proved, and any deficiency, however small, will defeat the plaintiff's bill. Our judicial history discloses several cases of great hardship resulting from this principle."

his wish, or qualified his refusal. To allow the effect of a direct refusal to account, to be qualified or done away by evidence thus loose and unsatisfactory, and to turn the plaintiff over to a new action, would be unreasonable."

13. The mortgagee's neglect to deliver an account of the debt, on demand, is no ground for extending the time of redemption.¹

14. In *Allen v. Clark*,² it was held, that the demand for an account may be valid, though accompanied by other demands and proposals, which the mortgagee is not bound to notice. Also, that the account rendered should state, not only the amount due, but the items. Wilde, J. says: ³ — "The demand was well enough, and the plaintiff had a right to insist on the disclosure of the items of the account demanded. There is an express demand of a true account of the money due on the mortgage; which is sufficient, if nothing more had been added. A demand was also made for an account of the rents and profits, and the expenses for repairs and improvements, and other demands and proposals were super-added. But this superfluous matter did not vitiate the demand of an account of the money due on the mortgage. The defendant was therefore bound to comply with the demand, so far as it was made in pursuance of the statute. The plaintiff could not ascertain by the account furnished what sum was justly due, and it was the intention of the legislature that the mortgagee should, on request, furnish the mortgagor with such information as would enable him to tender the sum justly due; and not to leave him exposed to the danger of tendering more, for want of knowledge of the facts. The mortgagee must truly state his account, so that the other party may ascertain the sum which may be justly due."

15. In Maine, where a mortgagee, upon demand of the mortgagor for a true account of the sum due, states two items, claiming payment of both in order to a redemption of the mortgage, when only one is due; this is not a *true ac-*

¹ *Sanborn v. Dennis*, 9 Gray, 208.

² 17 Pick. 47.

³ *Ib.* 53.

count, and the mortgagor may maintain a bill for redemption without a tender.¹ Whitman, C. J., adverts to the decision in *Willard v. Fiske*, (*supra*, § 10,) that the Massachusetts statute on the same subject should receive a liberal construction in favor of the mortgagor, being designed to facilitate redemption, and that a denial of the plaintiff's right is sufficient to maintain a bill. He proceeds to say: "Ayer's reply was virtually a denial of the plaintiff's right to redeem, unless he were paid both of the sums. If he had a right to exact both sums, then his reply was a true statement of the sum due." "The object of a demand in such cases must be believed to be to obtain a statement of the precise sum due, so that a tender could be made, which would be accepted. If a mortgagee states a variety of items as presenting the amount due, and he has no right to one or more of them, it is no statement of the sum due."²

16. If the mortgagee does not notify the mortgagor of the exact sum due in reasonable time after request, this is an "unreasonable neglect," and a bill for redemption may be brought without tender, and judgment recovered for costs.³

17. A bill in equity to redeem alleged a written request for an account, and an unreasonable neglect or refusal. The answer admitted that such request was made, and that no account was presented in compliance with it; but set forth, that, at a previous hour of the same day, the defendant exhibited to the plaintiff the amount due on the unpaid note, and informed him that there were no claims for repairs or expenditures, and that no rents and profits had been received. The plaintiff inquired, whether he had not better take the amount due upon that note and let him have the property. The answer of the defendant was, that he thought he should be willing that some suitable person should say, taking into consideration all the property and the demands of both the parties, what would be right and just. Held, the statute was designed to inform a party seeking to redeem of the ex-

¹ *Cushing v. Ayer*, 25 Maine, 383.

² *Ib.* 388, 389.

³ *Pease v. Benson*, 28 Maine, 336;
Roby v. Skinner, 34 *Ib.* 270.

act amount claimed to be due on the mortgage; and any failure to afford it within a reasonable time after request was an unreasonable neglect or refusal. The information respecting the amount due on the note, being always accompanied by the assertion of other claims, to be adjusted before the plaintiff's right to redeem could be admitted, left it obscure and uncertain whether those other claims were not insisted upon as necessary to be paid by one entitled to redeem. Under such circumstances, the plaintiff might properly make the formal request alleged, and a neglect to answer it was unreasonable. Decreed, that the plaintiff should have a release of the mortgage title, upon payment of the amount secured by it which remained unpaid, and recover costs.¹

18. It is a sufficient demand of an account, if the mortgagor in writing request that such account be left with his attorney, "if more convenient" to the mortgagee, and have it served by an officer upon the mortgagee.²

19. In New Hampshire, (and undoubtedly this is the general rule,) a tender for the redemption of a mortgage after condition broken must be unconditional, and not upon the proviso that the mortgagee will release or reassign.³

20. In Vermont, a mortgagor tendered the amount of the debt to the mortgagee's attorney, and demanded the mortgage note, which note had never been negotiated. The attorney replied that he could not then conveniently find the note, but offered to give a receipt for it, and discharge the mortgage. The mortgagor refused to pay the money, unless he could have the note. Held, the tender was no bar to an action of ejectment on the mortgage.⁴

21. In *Loring v. Cooke*,⁵ the plaintiff sought to redeem an equity of redemption sold on execution; but it appeared, that, when he tendered the amount due, he insisted on the defendant's executing a release of the equity; and upon his refusal, withdrew the tender. Held, the tender was insuffi-

¹ *Pease v. Benson*, 28 Maine, 336.

² *Farwell v. Sturdivant*, 37 Maine, 308.

³ *Wendell v. N. H. Bank*, 9 N. H. 404.

⁴ *Holton v. Brown*, 18 Verm. 224.

⁵ 3 Pick. 48.

cient. The defendant was not bound to execute a release, the statute requiring an unconditional payment, and leaving the party his remedy by a bill in equity, if the estate is withheld. It matters not, that the plaintiff was not legally bound to redeem; for if he elects to do so, he must comply with the statute. There was no tender nor refusal, but only a conditional offer to pay.

22. In case of redemption, the plaintiff will be charged with costs, although he obtain a decree to redeem, if the defendant has been in no fault.¹ (See chap. 32.)

23. A mortgagee in possession, neglecting to render an account of rents and profits on demand, and claiming more than is due, is liable for costs in a suit to redeem.²

24. If the respondent (mortgagee) renders his account in a reasonable time after demand, the mortgagor recovers no costs. If the mortgagee denies the right to redeem when it exists, he recovers no costs.³

25. Where, in a bill in equity to redeem, the plaintiff pays money into court, and the defendant resists his right of redemption and prevails; the latter shall not retain the money so paid in. There is no analogy between such payment, and the payment of money into court by a defendant in a common-law suit. By the latter, the defendant admits his absolute liability for that sum, and formally offers it in satisfaction thereof. If not accepted, it is paid into court for the plaintiff's use, and the defendant derives the full benefit of it, because it is a bar *pro tanto* to all claim for such sum. But in the present case, the payment is a *provisional* one, an offer to pay money in discharge of the debt, and for the purpose of removing the incumbrance. The defendant, by his defence, denies that there is any debt secured by mortgage, and his own formal act shows that he has no claim to the money.⁴

26. Payment into court of less than the amount of the

¹ Bourne v. Littlefield, 29 Maine, 302.

³ Kittredge v. M'Laughlin, 38 Maine, 513.

² Sprague v. Graham, 38 Maine, 328.

⁴ Putnam v. Putnam, 13 Pick. 131, 132.

debt, in a suit for redemption, without any rule or order of court, or any averment or proof of a previous tender, does not in any way affect the rights of the parties.¹

27. In a bill to redeem, where, upon the hearing, the orator claimed that something should be deducted from the amount due the defendant in equity, but made no allegation in his bill that the defendant had received rents, and only alleged that he threatened to do so, and had actually turned his cattle upon the land; and the bill contained no prayer for any account of such rents, and the orator did not claim to have any such account taken in the Court of Chancery: it was held, that, in finding the amount due in equity, no deduction should be made on account of rents and profits received by the defendant.² (*f*)

¹ Hart v. Goldsmith, 1 Allen, 145.

² Cree v. Lord, 25 Verm. 498.

(*f*) In Tennessee, when land is sold under a decree in equity upon foreclosure, the mortgagor may redeem within two years; except upon an order for a sale on credit. Code, 1858, § 2124.

CHAPTER XXIX.

CONCURRENT REMEDIES OF THE MORTGAGEE. SUITS UPON THE MORTGAGE AND THE PERSONAL SECURITY ; IN LAW AND EQUITY.

1. The mortgagee may pursue all his remedies at once ; cases illustrative of this principle.

5. Affirmations or qualifications of the rule by statutory provisions in the United States.

6. New York.

11. New Jersey.

15. Maryland.

16. Pennsylvania.

18. Ohio.

19. South Carolina.

20. Kentucky.

22. California.

23. Iowa.

24. Indiana and Illinois.

1. It has been already stated as the general rule, that the remedies of a mortgagee are *concurrent* ; that is, although the debt is the principal thing, and any satisfaction of the debt of course extinguishes the security, which is merely collateral, that, until such satisfaction, and for the purpose of obtaining it, the creditor may at the same time institute distinct processes upon the debt and the mortgage, the one directed against the person or the general property of the debtor, the other against the land mortgaged, solely and specifically. It is said, "a mortgagee is a general creditor of the mortgagor ; he has a right to proceed against the general personal property of the mortgagor, or against the person of the mortgagor, as a collateral security for the payment of his debt ; but his proper character is that of a creditor, and the securities he holds are merely securities to enable him to obtain payment of his debt."¹ Thus a creditor may proceed by bill in equity to foreclose a mortgage given to secure a bond, and at the same time by action at law on the bond ; and, though he can have but one satisfaction, he is entitled to his costs in both courts.² So, although a mortgage

¹ Per Bayley, B., Attorney-General v. Winstanley, 5 Bligh, (New,) 144 ; acc. Ely v. Ely, 6 Gray, 439.

² Very v. Watkins, 18 Ark. 546.

provides, that upon breach of condition the mortgagee may enter and take the rents and profits; he still has the right to foreclose and sell.¹ So, though the mortgage provides for a foreclosure by *advertisement*.² And a *power of sale* does not affect other remedies of the mortgagee.³ So although a creditor has the body of his debtor in execution, he may still proceed in equity to foreclose a mortgage given for security of the debt, and to remove any fraudulent incumbrances upon the property.⁴ So a motion was made for a rule to show cause, why the defendant should not be discharged out of custody on filing common bail, upon an affidavit stating, that, having borrowed £300 of the plaintiff, he had given him by way of security, a mortgage of a term for forty-five years of an estate let at £40 a year, and also a bond; that, the interest being in arrear, the plaintiff had filed a bill of foreclosure, had soon after got into possession of the estate, and had served the defendant with a subpœna to hear judgment as on the 29th of May; after which service he had arrested him in an action on the bond in this court; and that the mortgaged premises were an ample security for the debt. Lord Mansfield said, the motion could not be complied with, for that it had been settled over and over again, that a person, in such a case, is at liberty to pursue all his remedies at once; and the rule was refused.⁵ So, where actions were brought against the maker and indorser of a note, secured by a mortgage on real estate of the maker; and the defendant contended, that the plaintiff could not maintain the suits, without having released or offered to release the mortgage; the Court say: "The mortgage is wholly distinct from, and collateral to, the note, affording the creditor a separate and distinct remedy. The defence presupposes, that the law will compel a creditor to release his collateral security as a condition precedent to obtaining judgment; when obtaining judgment is only one step, and that often a very remote one,

¹ Harkins v. Forsyth, 11 Leigh, 823; Varney v. Forward, 15 Eng. Law & Eq. 451.

² Byron v. May, 2 Chand. 103.

⁴ Tappan v. Evans, 11 N. H. 311.

³ See Gowin v. Branch, &c. 7 Ala.

⁵ Burnell v. Martin, Doug. 417.

towards obtaining satisfaction. To state such a proposition is sufficient to refute it." Judgment for the plaintiff.¹ So, where there was a mortgage, with an agreement, that after payment of the debt the mortgagee should hold the property or convey it to the appointee of the mortgagor's wife for her separate use; and, the same day, the husband and wife transferred to the mortgagee her interest in her father's estate: held, the mortgagee might resort to either or both securities for payment of his debt.²

2. And the general rule has been in some cases still farther extended; authorizing simultaneous proceedings in law and equity against the land itself.³ Thus the mortgagee, pending an action upon the mortgage, may bring a bill in equity against the same defendant, as claiming under a fraudulent title.⁴ So, either on a legal or equitable mortgage, the mortgagee may at the same time bring an action of ejectment, and file a bill to foreclose.⁵ Washington, J., says: ⁶— "The objects of the two suits are totally distinct; and it is no objection to the remedy sought in equity, that the plaintiff has another remedy which he may pursue at law. In the one, he seeks to obtain possession of the mortgaged premises; and in the other, to compel the mortgagor to pay the debt, for the security of which the mortgaged property was pledged." So the recovery, by a mortgagee, of a judgment at law, for the amount of the mortgage debt, does not preclude him from subsequently foreclosing the mortgage.⁷ Nor does a mortgagee, by bringing a writ of entry to foreclose, and obtaining a conditional judgment, waive his right to take possession of the land, during the two months allowed to the mortgagor to pay the judgment, even though he enter for the purpose of foreclosure, for which purpose the entry is ineffectual.⁸

¹ *Hale v. Rider*, 5 Cush. 231, 232.

² *Young*, 3 Md. Ch. 461.

³ *Coote*, 403, 572; 1 *Pow.* 16, n.; *Thayer v. Mann*, 19 *Pick.* 537; *Cop-perthwait v. Dummer*, 3 *Harr.* 258; *Morrison v. Buckner*, *Hemp.* 442.

⁴ *Tappan v. Evans*, 11 N. H. 311.

⁵ *Hughes v. Edwards*, 9 *Wheat.* 489.

⁶ *Ib.* 494.

⁷ *Thornton v. Pigg*, 24 *Mis.* 249.

⁸ *Mann v. Erle*, 4 *Gray*, 299. See *Gerrish v. Mason*, 4 *Gray*, 432.

3. It will be seen, however, that the practice of pursuing different remedies, to enforce substantially the same claim, has been subjected to some reasonable restrictions. And in no case is the mortgagee bound to pursue this course.¹ (a)

¹ *Brown v. Stewart*, 1 Md. Ch. 87.

(a) Where a mortgage of indemnity was foreclosed at law, before the mortgagee had been damnified: held, the mortgagor might redeem. *Thurston v. Prentiss*, Walk. Ch. 529.

But a mortgagee may file a bill to foreclose a mortgage given to indemnify him against his liability on a bond, without first bringing a suit at law to ascertain the amount of the damages. *Rodgers v. Jones*, 1 McC. Ch. 221.

In general, a decree upon foreclosure, that the plaintiff have execution for any balance unsatisfied by the sale, is erroneous. *Stark v. Mercer*, 3 How. (Miss.) 377; *Humes v. Shelly*, 1 Overt. 79; *McGee v. Davie*, 4 J. J. Marsh. 70.

Unless, without the mortgage, the Chancellor would have jurisdiction of the debt. *Morgan v. Wilkins*, 6 J. J. Marsh. 28; *Crutchfield v. Coke*, Ib. 89.

The following cases, by their peculiar circumstances, have given occasion to some modification of the general principle above laid down, as to the unqualified right of the mortgagee in enforcing his securities.

In a case where the mortgagee had died, leaving no known heir, equity enjoined the executor from enforcing the debt at law, and ordered the money paid into court until the heir could be found. An act of Parliament was afterwards passed in reference to this case. So, where the title-deeds had been lodged by the mortgagee with an attorney who claimed a lien on them, the Court enjoined proceedings at law, and ordered the money to be paid into the bank, till the deeds were secured, and a reconveyance had. (*Schoole v. Sall*, 1 Sch. & Lef. 176; 1 Pow. 16, n.) So in *Beckford v. Kemble*, (1 S. & S. 7.) mortgagees of a West Indian estate were enjoined from foreclosing a mortgage in a colonial court, after a decree for an account on a bill filed in England to redeem; all the parties being in England. So in *Bentinck v. Willink*, (2 Hare, 1.) the Court refused to dissolve an injunction, restraining the mortgagee of a Demarara estate from proceeding in a suit upon a note for payment of an instalment, unless the mortgagor gave security to account for what he so recovered, in case the mortgagor was damnified by the mortgagee's not producing the "grosse" copy of the act of hypothecation, the production of which he claimed as necessary to his discharge.

The Court will not stay execution upon a judgment recovered by the

So a mortgagor cannot compel the mortgagee to foreclose, especially where the mortgage is the only security for the debt.¹ So, where the assignees of an insolvent debtor filed a petition in equity, setting forth that they were informed, and believed, that the respondents made some claim adverse to the petitioners to real estate of the insolvent, which claim was unfounded, but prevented a sale, and praying that the respondents might show cause for not bringing a suit to try their title; and the answer set forth a mortgage duly recorded, prior to the insolvency proceedings; and that the mortgage debt was still due: held, the petition should be dismissed. Shaw, C. J., says:—"The petitioners may meet with difficulties in disposing of the land, but no reason is shown why the respondents should be obliged to bring an action. The petitioners, if they deny the validity of the mortgage altogether, as one fraudulent against creditors, can bring a writ of entry themselves to try the title; and the defendants in their plea would be obliged to admit or deny the petitioners' title."² So an unconditional dismissal of a bill to restrain the defendant from enforcing a bond and mortgage against the plaintiff, either at law or in equity, would, it seems, be an absolute bar to the plaintiff's right of redemption.³

4. Where a judgment has been recovered upon the mortgage bond; in a suit for foreclosure, the validity of the bond cannot be denied.⁴ So where a mortgage is given to secure a title, and judgment confessed in a suit upon the warranty of such title; in a subsequent bill to foreclose, the defendant cannot, in the absence of fraud, set up as a defence, that the judgment was confessed by duress.⁵

¹ Kinlock v. Savage, Spears, Ch. 464.

² Dewey v. Bulkley, 1 Gray, 416.

³ Crane v. Hubbel, 7 Paige, 413.

⁴ Hosford v. Nichols, 1 Paige, 220.

⁵ Hamilton v. Clarke, 1 Bibb, 251.

mortgagee in an action of covenant, upon the ground that he has agreed to sell the estate for a larger sum, and that the mortgagor has filed a bill to set aside this contract. Willes v. Levett, 1 De Gex & Sm. 392.

5. It has been seen (*supra*, ch. 27,) that, in nearly all the United States, the remedies of a mortgagee have been precisely defined by minute statutory provisions. These statutes, however, have not for the most part changed the general principle above stated, that the mortgagee may pursue all his remedies, or enforce all his securities, concurrently or successively, until the mortgage debt be fully paid. In New York, a more decisive change has been made, perhaps, in this respect, than in any other State.

6. In New York, if a suit at law has been commenced on the bond, a bill for foreclosure may be brought without discontinuing it; but no judgment will be rendered or execution issued in such suit, without leave of Chancery. If the suit is against one not party to the bill, against whom it is doubtful whether there could be a decree over, in case of deficiency, though made a party; and if the land is insufficient security for the whole debt; the Court will allow the defence to proceed in order to settle its validity, but will not issue execution without leave of Chancery.¹

7. A bill to foreclose should state, that no proceedings at law have been had to recover the debt, or any part thereof; or, if there have been such proceedings, the nature of them, and that they have been discontinued, or that the remedy at law has been exhausted.² (2 R. S. 192, § 156.) But the holder of a bond and mortgage may, after judgment and execution thereon returned unsatisfied, file a bill for satisfaction out of the equitable property of the debtor, without a prior foreclosure of the mortgage, unless the mortgaged premises have, by sale subject to the mortgage, or otherwise, become primarily liable for the debt.³

8. The holder of a bond and mortgage, having commenced an action upon the bond, and learning that the mortgagors were insolvent, filed a bill for foreclosure. The defendants, having put in a defence to the action at law, applied to the

¹ *Williamson v. Champlin*, 8 Paige, 70; *1 Clark*, 9; *Suydam v. Bartle*, 9 Paige, 294.

² *Pattison v. Powers*, 4 Paige, 549.

³ *Palmer v. Foote*, 7 Paige, 437.

court in which it was pending, and obtained an order that the plaintiff proceed to trial, or that judgment be entered as in case of nonsuit. The plaintiff then applied in Chancery for leave to proceed to judgment in the suit at law. Held, unless the defendants consented to a discontinuance of the action at law without costs, the Court would permit the plaintiff to proceed to trial in that action, notwithstanding the pendency of this bill.¹

9. In *Engle v. Underhill*,² a mortgagee, having commenced actions upon the bonds secured, filed a bill for foreclosure, and moved for leave to proceed with the action, upon the ground that the value of the premises had been diminished by fire. The motion was denied. McCoun, Vice-Chancellor, says:³ — “It was a common practice, before the passage of the revised statutes, for a mortgagee to proceed at law upon the bond at the same time that he proceeded in this court upon the mortgage. (b) The revisers, however, very properly thought this unnecessary, and the statute now provides for a decree over against the mortgagor, as a substitute for a judgment at law, and takes away the remedy at law on the bond, while a bill of foreclosure and sale of the mortgaged premises is pending, ‘unless authorized by the Court of Chancery.’ (2 R. S. 191.) Here is a discretion vested in this court, but which is not to be made use of, except in extraordinary cases. And the fact of deterioration in the value of the mortgaged premises by fire, is not a sufficient ground to allow this complainant to work two remedies at the same time. He might himself have guarded against the loss by an insurance.”

¹ *Thomas v. Brown*, 9 Paige, 370.

³ 3 Edw. 251.

² 3 Edw. 249. See *Jones v. Conde*,
6 Johns. Ch. 77.

(b) On a bill to foreclose a mortgage, the mortgagee was confined to his remedy on the mortgage, and, if the mortgaged premises were insufficient to pay the debt, he must resort to his action at law for the deficiency. *Dunkley v. Van Buren*, 3 Johns. Ch. 330.

10. Where the mortgagee recovers a judgment by default upon the bond secured, and afterwards files a bill to foreclose, the defendant cannot set up as a bar to the latter suit any defence made in the former one.¹

11. In New Jersey, it is said, a bond and a mortgage given to secure it are to be regarded, for some purposes, as separate obligations for the same debt. The creditor may thus treat them; he may proceed singly upon the obligation, or singly upon the mortgage, either by an ejectment to recover possession, or by bill in chancery to foreclose; or he may enforce both securities at once. If an ejectment is brought, the plaintiff recovers possession, and retains it till payment of the debt; gaining no title, but being a trustee for the mortgagor, and accountable for the rents and profits. If he sue upon the bond, he may levy his execution upon all the defendant's property, whether included in the mortgage or not. If the mortgaged premises are sold, the purchaser takes a title wholly independent of the mortgage. The mortgagee may be considered as a party to the proceedings, and, having treated the property as the mortgagor's, it would be at least questionable whether he should not be estopped from ever after claiming under the mortgage. This is the general understanding of the country; the purchaser bids as if there were no mortgage; all parties are considered as joining in the sale; and, in case of any deficiency, the estate is considered as discharged of the claim.²

12. Where a mortgagee, before the mortgage becomes due, has filed a bill to restrain waste, he may, pending the bill after the debt becomes due, file a supplemental bill for other relief, to foreclose the equity of redemption, and for a sale of the estate.³

13. A second original bill would be improper in such case.⁴

14. In *Den v. Spinning*,⁵ the plaintiff, having taken a mort-

¹ *Morris v. Floyd*, 5 Barb. 130.

² *Harrison v. Eldridge*, 2 Halst. 408, 409.

³ *Allen v. Taylor*, 2 Green, Ch. 435.

⁴ *Ibid.*

⁵ 1 Halst. 466.

gage from the defendant, joined the British armies during the Revolutionary contest, and final judgment was entered against him on an inquisition of treason. Subsequently, the State, by a legislative act, transferred all the residue of the plaintiff's personal estate, remaining undisposed of, to his daughters. The principal question arising in the case was, whether any interest in the mortgage deed vested in the daughters, they being the real plaintiffs, upon which this action could be maintained. Held, the action did not lie. Boudinot, J., says:¹ — "The law allows to the plaintiff (the mortgagee,) several remedies; he is allowed to elect between them, or to pursue them all at the same time, and I am not aware that this Court has any authority to interpose or to control him in the exercise of this power. There is no question, in my mind, as to the power of the legislature to pass a law authorizing Jouet, or any other person, to whom the estate was given, to sue for the same in an action of ejectment. No such authority has, however, been given, nor can I find that any legislative act was passed, declaring in what manner or in whose names actions for the recovery of real property should be brought. While I acknowledge that the interest of the mortgagee is a personal interest; that the daughters of Jouet might have brought an action of debt on the bond in the name of their father, yet I regard this as an action of a peculiar kind, intended to enforce a personal demand by proceedings of a real nature. The act authorizing personal suits, does not, in my opinion, extend to actions of ejectment."

15. In Maryland, the Court remark, "Where the debt has been secured by a mortgage, a covenant to repay, and a bond, the creditor may be allowed to pursue all his remedies at once. He may bring an action of covenant to repay the money; institute an ejectment against the tenant in possession; file a bill in equity to foreclose; and also maintain a suit upon the bond at the same time. But he cannot have

¹ 1 Halst. pp. 471, 472, 473.

the mortgaged property awarded to him by a decree of foreclosure, and also recover the money or any part of it from the debtor by a suit upon the covenant or bond.”¹

16. It is said in Pennsylvania, “The bond and mortgage are securities for one and the same debt; for which the mortgagee has three remedies. He may proceed by way of ejectment, to recover the possession of the premises, or he may have a *scire facias* on the mortgage, or an action of debt on the bond, in which two last cases the debt may be recovered by a sale of the premises. But there is this difference between a judgment on the *scire facias* and on the bond, that in the former the execution is restricted to the subject mortgaged; but in the latter, any other property of the mortgagor may be levied on, or his person may be taken in execution. The mortgagee may pursue either or all of the remedies which I have mentioned, until he obtains satisfaction for his debt. But he cannot sell the land twice. The house having been sold under the judgment on the bond, the mortgagee could not make a second sale by *levari facias* under a *scire facias* on the mortgage.”²

¹ Per Bland, Chancellor, *Andrews v. Scotton*, 2 Bland, 665.

² *McCall v. Lenox*, 9 S. & R. 304. (c)

(c) In this case, the facts were as follows:—A creditor takes a mortgage and a bond with warrant to confess judgment. The mortgage is recorded, but judgment not entered upon the bond until a year afterwards, and, between the recording of the mortgage and the entering up judgment on the bond, the mortgagor makes a lease for years. An execution issues on the judgment, and the mortgaged premises are levied, condemned, and sold, no *scire facias* having been issued on the mortgage which is then due. The lease being unexpired, an amicable action was instituted, to decide, whether the purchaser at the sheriff's sale was entitled to possession from the time of taking a deed, or the lessee under his lease. Held, the sale avoided the lease.

Gibson, J., who dissented from the opinion of the Court, remarks: “The mortgagee may waive the benefit of his mortgage; and where a purchaser under the judgment on the bond is induced by his acts to believe that he does so, and pays a full price for the estate, the mortgagee will not be per-

17. In Pennsylvania, a mortgage and the claim secured by it are so far distinct, that where *scire facias* is brought on a bond with warrant of attorney, it is no defence, that a mortgage by which the bond was secured is not in the plaintiff's possession, or is lost, mislaid, or destroyed.¹

18. In Ohio, a decree of dismissal of a bill for foreclosure is no bar to a suit at law for the mortgage debt.² Thus, in an action upon a note, the defence was, that the note was secured by mortgage, and that a bill for foreclosure and sale had been brought to enforce satisfaction of the note, which had been dismissed on hearing. Held, the defence was not sufficient. Lane, C. J., says: ³ — "The record of the suit in Chancery, shows a dismissal upon the finding, that the equity of the case is with the defendant. The proposition of the defendant, arising from these facts, is, that the dismissal of a bill of foreclosure on the merits, extinguishes the debt secured by the mortgage, and concludes all rights between the parties. While the remedy upon mortgages in this State was by *scire facias*, before 1831, it was held, that the rights between the parties were merged in such a proceeding, because they terminated in a judgment, which is a form of debt (of) an higher nature than any depending on the acts of the parties only. (1 Ohio, R. 157.) But the right to pursue all or either of the three remedies on a mortgage

¹ Hodgdon v. Naglee, 5 Watts & S. 217.

² Longworth v. Flagg, 10 Ohio, 300.

³ Ib. 304.

mitted to disturb him for the balance due on the mortgage; for in such case a Chancellor would enjoin him; and as to third persons, the purchaser standing in the place of the mortgagor would be considered as having the legal title. With us, the practice has been universal, where the land has been pursued on the bond, to sell without any reservation of the lien of the mortgage; and the purchaser is therefore always considered as having acquired the legal, as well as the equitable estate. But it is clear beyond a doubt, that the mortgagee may, by express reservation, sell the interest bound by the judgment, subject to his own mortgage; and where both parties proceed on the basis of such reservation, his security will not be lessened by the sale." *McCall v. Lenox*, 9 S. & R. 307.

at the same time, is asserted in every elementary treatise on this subject; for the objects of the three are not the same; and although if the debt is paid the lien is extinct, the converse of this proposition is not true, and the debt may be justly due, although the land is never bound by the lien."

19. In South Carolina, where lapse of time was relied upon in defence to a suit for foreclosure, as raising the presumption of payment, the plaintiff was turned over to law, with his bond.¹

20. In Kentucky, where a vendor has conveyed land, and taken a mortgage back for the purchase-money, recovered a judgment at law for the money, and then gone into equity to foreclose his mortgage; the Chancellor ought only to enforce the law in discharge of the demand, and not give him a decree in addition to the judgment.²

21. A. gave his notes to B., who assigned them to C., and then A. executed a mortgage to C. to secure the notes. Held, that B. retained no lien which was secured by the mortgage, and that C.'s bill to foreclose was not a bill to enforce specifically a contract for land, or a lien, and therefore that the Chancellor had no jurisdiction of the original demand, and could only order a sale of the estate; and that, the estate not sufficing to pay the mortgage, the creditor must go to law to recover the balance, the Chancellor having no power to decree that an execution should issue for the balance, as on a judgment at common law.³

22. In California, the plaintiff holding notes of the defendant, the latter agreed to secure them by a mortgage, the plaintiff agreeing to give up and cancel the notes, and rely upon the land alone for payment of his debt. In a suit to foreclose, held, the plaintiff could not have execution for a balance due after a sale of the property.⁴

23. In Iowa, the mortgagee may have a decree of foreclosure, though a suit is pending on the note.⁵

¹ *Gibbes v. Holmes*, 10 Rich. Eq. 484.

² *Martin v. Wade*, 5 Monr. 77.

³ *Pool v. Young*, 7 Mon. 587.

⁴ *Moore v. Reynolds*, 1 Cal. 351.

⁵ *Knetzer v. Bradstreet*, 1 Greene, 382.

24. In Indiana and Illinois, the mortgagee may bring a suit on the note or bond, an ejectment for the land, and a bill to foreclose ; and these remedies may be concurrent or successive.¹ But where the payee of a mortgage note proceeds on his note at law and on his mortgage in chancery, at the same time ; a satisfaction of either the decree or the judgment is a satisfaction of both.²

¹ *Slaughter v. Foust*, 4 Blackf. 381 ; Ind. Rev. Sts. 1831 ; *Delahay v. Clement*, 3 Seam. 203.

² *Fairman v. Farmer*, 4 Ind. 436.

CHAPTER XXX.

FORECLOSURE BY ACTION AT LAW. — NATURE OF THE ACTION,
AND WHAT IS NECESSARY TO MAINTAIN IT. — FORECLOSURE
IN EQUITY.

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| <p>1. Various forms of proceeding for foreclosure.</p> <p>2. Real action. Not governed by the strict rules of real actions. Regarded as a suit to enforce payment. Whether it lies against any one but a tenant of the freehold.</p> <p>7. Question of jurisdiction, in Massachusetts, as affected by the purpose for which the action is brought.</p> | <p>11. The defendant cannot dispute the title of the mortgagee.</p> <p>12. Nor set up a paramount title of a stranger.</p> <p>15. The defendant may rely upon a tender of the debt.</p> <p>16. The plaintiff must prove an ouster.</p> <p>17. Suit in equity for foreclosure, when it does not lie.</p> |
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1. *The forms of proceeding*, in actions instituted for the purpose of enforcing the rights of mortgagees and mortgagors, must of course vary with the nature of such actions, and the tribunals, whether of law or equity, before which they are brought.

2. As has been already stated, (ch. 28,) in many of the States, the mortgagee may recover the land by a writ of *ejectment* or *real action*. It is said, "Where the matters between the parties interested in a mortgage are complicated, the better practice is for a bill in equity to be brought to foreclose the mortgage. There may be cases where the Court would not investigate the matters in making up a conditional judgment, but turn the party round to a bill in equity."¹ But still, in consideration of the nature of a mortgage, as mere security for a debt, and the paramount purpose of a suit upon it, which is, to enforce payment of such debt; an action to foreclose, though in form a real action, is not regarded as strictly such, nor subject to all the rules which

¹ Per Eastman J. *Aiken v. Gale*, 37 N. H. 510. — These are exceptional cases

govern real actions.¹ (a) Thus it is said by the Court in Massachusetts: "The action of mortgagee against mortgagor, by the laws of this Commonwealth, is substantially a statute proceeding; it is a remedy, at once furnished, regulated, and limited by statute."² (b) And in a later case: "Our special real action to foreclose a mortgage is a peculiar proceeding, resembling, in substance, perhaps, as much a bill in equity as a suit at law. Courts are fully authorized in this action to make any such order or decree, and issue any such process, as justice and equity may require. Little aid, therefore, can be drawn from the rules regulating other

¹ Penniman v. Hollis, 13 Mass. 430; Amidown v. Peck, 11 Met. 467; Price v. The State, &c. 14 Ark. 50; 37 N. H. 510.

² Per Shaw, C. J., Wearse v. Pierce, 21 Pick. 143.

(a) The *hypothecary* action, in Louisiana, is a real action, following the property wherever it may be found, and may be instituted before a court of ordinary jurisdiction. *Boguille v. Faille*, 1 La. Ann. 204.

Equity acts only *in personam*, not *in rem*; and, if a bill for foreclosure is filed in the State where the land lies, all parties being citizens of another State, jurisdiction can be acquired only by service of process. *Grace v. Hunt, Cooke*, 341.

In Connecticut, a bill for foreclosure need not be brought in the county where the land lies, the title of the mortgagee not being in question. *Broome v. Beers*, 6 Conn. 198. Such bill is held in Kentucky to be both *personal* and *local*; and either the person of a necessary defendant, or the locality of the land, may give jurisdiction. *Caufman v. Sayre*, 2 B. Mon. 202.

In Ohio, a proceeding for foreclosure, though in the nature of a proceeding *in rem*, is still an *adversary* proceeding, in which the mortgagor's right is determined; and he is entitled to his day in court. *Moore v. Starks*, 1 Ohio, State, 369.

In Missouri, a proceeding to foreclose under the statute is a proceeding at law, and is not governed by the rules of proceeding in equity. *Riley v. McCord*, 24 Mis. 265.

In Texas, a mortgage being a mere security, the mortgagee cannot sustain an action of trespass to try title against the mortgagor. *Duty v. Graham*, 12 Tex. 427.

(b) Actual entry, by a mortgagee or his assignee, is not necessary to sustain an action by the latter upon the mortgage. *Tuttle v. Brown*, 14 Pick. 514. See *Livingston v. Story*, 11 Pet. 351.

real actions.”¹ So it is said in Kentucky, (with more especial reference to a suit in equity:) “A mortgage, being intended as a collateral security, and being, moreover, entitled to no other effect in equity, should not, as a mere matter of election by the mortgagee, be enforced by a court of equity, for any other purpose than that of paying the debt, or so much thereof as shall be due and unpaid at the date of the decree, nor to any greater extent than the default of the mortgagor, and the right of the mortgagee, as to the debt, which is the principal; the mortgage, and the equities resulting therefrom being merely incidental.”²

3. In conformity with these distinctions, a plea to a writ of entry by the assignee of a mortgage, that the defendant was not tenant of the freehold, but that another person (naming him) was tenant of the freehold, and the defendant only a tenant at will under him, was upon demurrer held bad.³ The Court say:⁴ “An action for possession by a mortgagee is not governed altogether upon the general principles applicable to real actions. It is wholly bottomed on our statutes. The right to the freehold is not decided in such action. Any person in possession of the mortgaged premises is liable to the action of the mortgagee.” So, where the mortgagee brings an action upon the mortgage after an entry to foreclose; such entry is no defence under the general issue, if it would be under any form of pleading.⁵ So, in the case of *Penniman v. Hollis*,⁶ where the question arose, whether a *reversioner* was liable to an action for foreclosure, it is said: “From the peculiar nature of the relation between the mortgagor and mortgagee, it would be no answer to an action brought by the mortgagee to foreclose, that he, the mortgagor, was not tenant of the freehold. The deed of mortgage creates a contract respecting a debt, as well as a conveyance of the estate. It is a collateral security only; and the means of coercing the debtor by a suit upon it, ought

¹ Per Shaw, C. J., *Peck v. Hapgood*, 10 Met. 173.

² Per Robertson, C. J., *Caufman v. Sayre*, 2 B. Monr. 205, 206.

³ *Keith v. Swan*, 11 Mass. 216.

⁴ *Ib.* 217.

⁵ *Devens v. Bower*, 6 Gray, 126.

⁶ Per Parker, C. J., 13 Mass. 430. See *Colby v. Poor*, 15 N. H. 198.

not to be trammelled by the nice, technical rules which govern real actions in general." Hence the action may be sustained, though the tenant is a mere reversioner. (c) The particular tenant is not prejudiced by the judgment in such action; because, if sued for possession, he can defend himself by setting forth his title. On the other hand, if a reversioner could not be thus sued, the mortgagee might be compelled to wait for the death of a tenant for life, before he could enforce his security. Though he cannot oust the particular tenant, it may be important to him to watch over the estate and prevent waste; or to enter for forfeiture; or to claim the rent, if any.¹ So, where one of two joint owners of the equity of redemption takes an assignment of the mortgage; he may maintain a writ of entry and recover conditional judgment against the other.² So, in *Walcutt v. Spencer*,³ where the defendant, in a suit on mortgage, relied upon a lease from one to whom the demandant had himself mortgaged before taking his own mortgage, and who had recovered a judgment; Jackson, J., says: "It is also very questionable whether this matter, if duly pleaded, would have availed the tenant in this action, which is founded upon our statute for foreclosing. If the party sued claims to hold the land by any title, independent of the supposed mortgage, the title may be tried as in a common writ of entry. But when the party sued has no title but as mortgagor, or as assignee

¹ 13 Mass. 429.³ 14 Mass. 411.² *Aiken v. Gale*, 37 N. H. 501.

(c) With respect to the relative rights of the reversioner, &c., and particular tenant of an estate mortgaged, it was formerly the rule, that a remainder-man, &c. could compel the tenant for life to contribute to the redemption; the former paying one third, the latter two thirds; or, as was once held, in the proportion of two fifths and three fifths. But the present rule is, that a tenant for life shall be required only to keep down the interest during his life; but if he refuse to redeem, the remainder-man may, by redeeming and ejecting him, and taking possession of the profits, or by filing a bill of foreclosure, compel the tenant for life to come in and contribute, or surrender the possession. Coote, 602.

of the right of redemption, the action becomes, in effect, a bill in equity to foreclose. The object and effect of it is, to ascertain what sum is due on the mortgage, and to foreclose. So far as regards that question, it seems important to inquire what estate the defendant has in the premises; at least, if he has the right of redemption which is sought to be foreclosed, he must be a proper party to the suit. Spencer, after the recovery against him by William Walcutt, still had the right to redeem as against both of the mortgagees. A recovery by the demandant will not prejudice William Walcutt; but he may still hold the land in virtue of the mortgage to him, until redeemed."

4. The same principle, with regard to the right of bringing an action for foreclosure against a party who might not be liable to an ordinary real action, is recognized in the following case:— The assignee of a mortgage having received rent from the tenant in possession, his administrator, upon his death, called on the tenant to attorn or surrender, but he denied the administrator's right, and refused to do it. The administrator then brought an action against him on the mortgage, without notice to the heirs or representatives of the mortgagor, who was also dead, recovered a conditional judgment, sued out an execution, entered, and remained in possession three years. The heirs of the mortgagor bring a bill in equity to redeem. Held, the mortgage was legally foreclosed, and the bill could not be maintained. After the demand upon the tenant by the administrator, and his refusal to surrender possession, and denial of the administrator's right, his holding became adverse, and he might be treated as a disseisor for the purpose of bringing a suit against him. Moreover, to make a judgment upon a mortgage good against particular persons, it is not necessary that they, or their tenant or agent, should be summoned. It is sufficient to bring the suit against the tenant in possession. Otherwise, mortgagees would be put to great difficulty in foreclosing by means of a suit. The security of a mortgage is a security *in rem*. The mortgagee looks to the land. If the mortgagor

has been left in possession, the law presumes that he remains in possession, or some person by his permission, or in privity with him, and that person is the tenant in possession. Besides, three years after possession taken are allowed for redemption by any person interested, and any delay to exercise this right is at their own peril.¹

5. It has been since held, that under the Rev. Stats. ch. 107, § 8, a writ of entry to foreclose cannot be maintained against a tenant for years, who holds strictly that relation, makes no greater claim of title, interposes no obstacle to the enforcement of the mortgage title, created by his lessor, but is ready and willing at all times to yield up the possession to the mortgagee. But any person in possession, who denies the mortgagee's right, refuses to yield possession, and prevents him from taking peaceable possession, may, at the election of the mortgagee, be deemed a disseisor, and treated as a tenant of the freehold by disseisin, and in such case be liable to this action.² So it has been held, that the defendant in an action for foreclosure must be a *tenant*, not a mere *servant* or *agent* of another. In a real action upon a mortgage, it appeared that the mortgagors were blind, and the defendant, their father, lived on the land with them, cultivated and improved it, as the sole manager and efficient agent. Held, the defendant was not a *tenant*, and the action could not be maintained.³ Wilde, J. says:⁴ — "The plaintiff relies upon a distinction between an action on a mortgage, and a common writ of entry, on the authority of *Keith v. Swan*, 11 Mass. R. 216, wherein it is said, that in an action on a mortgage, the right to the freehold is not decided, and that any person in possession of the mortgaged premises is liable to the action of the mortgagee. But the defendant in this case was not in possession; he was an agent only of the mortgagors, and the possession was in them." And, if a mortgagor has parted with his title, and is not in pos-

¹ *Shelton v. Atkins*, 22 Pick. 71.

³ *Churchill v. Loring*, 19 Pick. 465.

² *Wheelwright v. Freeman*, 12 Met. 154; *Raynham v. Snow*, ib. 157, n.

⁴ *Ibid.* 466.

session, he may plead a disclaimer to a real action for foreclosure; although the mortgagee and the assignee of the mortgagor are tenants in common.¹ So it is held that non-tenure is a good plea in abatement to an action on a mortgage.² So, where land was mortgaged by the defendant to a former guardian of the demandant, during his minority, in trust for the demandant; held, in Massachusetts, the demandant could not maintain a writ of entry for the land, never having had the legal estate, and the tenant having a good title against every one but the mortgagee and his assigns.³

6. The question, whether a suit for foreclosure could have been maintained against the parties defendants to that suit, does not arise in a subsequent action by the mortgagee for acts of trespass upon the land, committed after he had received seisin upon execution. Thus the plaintiff, a mortgagee, brought a suit for foreclosure against the mortgagor, one of the defendants, who was in possession, recovered a conditional judgment, and sued out an execution. Prior to the commencement of suit, the mortgagor had conveyed his equity of redemption, and pending the suit this grantee conveyed to the other defendant. At the time of service of the execution, both defendants were in possession, and forcibly ejected by the officer who delivered seisin to the plaintiff. The defendants afterwards entered and committed acts of trespass, for which the plaintiff brings this suit. Held, whatever might be the effect of the judgment as to a foreclosure, or the officer's right to expel the owner of the equity, this action was maintainable.⁴

7. In Massachusetts, by late statutory provisions, all real actions, except those for the foreclosure of mortgages, shall be brought in the Supreme Court; and some questions of jurisdiction have arisen upon the construction of these statutes. (*d*)

¹ *Olney v. Adams*, 7 Pick. 31.

² *Stark v. Brown*, 40 N. H. 345.

³ *Somes v. Skinner*, 16 Mass. 348.

⁴ *Miner v. Stevens*, 1 Cush. 482.

(*d*) By a late statute, the Supreme Court has concurrent jurisdiction with

8. Under Stat. 1840, c. 87, § 1, and Rev. Stats. c. 107, § 3, the question, whether a real action is brought *for the foreclosure of a mortgage*, so as to give jurisdiction to the Court of Common Pleas, depends not on the form of the writ, as setting forth a seisin in fee, or in fee and in mortgage, but on the facts proved in the case. And, if the former mode of declaring is adopted, that Court has authority to allow an amendment, by stating the plaintiff's claims as under a mortgage.¹

9. A mortgagee recovered a conditional judgment, on which a writ of possession issued, but was never delivered to an officer. The mortgagor soon after died, and a devisee of the land entered, and had ever since remained in possession. Twelve years afterwards, the mortgagee died, and his administrator, having entered upon the land, brings a writ of entry to recover it in the Supreme Court. Held, the suit was rightly brought. Bigelow, J., says :— “ The suit on the mortgage, for the purpose of foreclosing it, was brought in the lifetime of the intestate ; and the conditional judgment allowed by the statute was then rendered. The demandant does not now seek for any such judgment. The tenant, claiming under the original mortgagor, cannot again ask for it. It is under that very judgment, still in force, that the demandant has entered and become seised. His possession, taken under the judgment, was lawful ; for a man, who has judgment for possession, may enter without writ. The demandant, then, being lawfully in possession under the mortgage and judgment for the purpose of foreclosure, is disseised by the tenant. This action is brought, therefore, not for the purpose of foreclosure, but to protect the possession of the demandant against the wrongful act of the tenant.

¹ Blanchard v. Kimball, 13 Met. 300.

the Court of Common Pleas in the foreclosure of mortgages ; and all pending actions, which have been removed from the latter to the former court, shall proceed therein. Mass. Stats. 1852, 806.

The tenant is charged as a wrongdoer. To this he pleads only the general issue, thereby admitting the disseisin, and putting in issue only the title of the demandant. A mortgagee at common law may have judgment for possession before condition broken; and this right is expressly recognized in Rev. Sts. ch. 107, § 9. When, therefore, the object of the suit is not to foreclose a mortgage, but to recover possession against a wrongdoer, there seems to be no reason why the same judgment may not be recovered after condition broken. In such case, the right of the mortgagor or those claiming under him, to redeem, would not be affected, but would be enforced by a bill in equity."¹

10. Where a mortgagee has received possession of the estate, under an execution issued upon a conditional judgment in his favor, and is subsequently disseised by the mortgagor, before his right of redemption has expired; the mortgagee may maintain a writ of entry against him, in the Supreme Court, declaring on his own seisin, without setting forth the title under which he claims.² The Court remark:³ "The only doubt arises from the evidence introduced on the part of the demandant, which seemed to show that he claimed as mortgagee, and was only entitled to the conditional judgment. But this evidence was not necessary. It would have been sufficient to have exhibited the judgment without the mortgage. It is immaterial to consider what remedy a mortgagee would have, who, after having entered for condition broken, is ousted by his mortgagor. This is a proceeding, in which the defendants are charged as wrongdoers. They jointly deny the wrong, and insist on their right, and do not claim to stand on the footing of mortgagees (mortgagors). The action is therefore against wrongdoers and not against mortgagors, and rightly brought in this Court."

11. As may be gathered from the cases already cited in this chapter, it is the general rule of law, that the mortgagor,

¹ Richardson v. Hildreth, 8 Cush. 225, 227, 228.

² Miner v. Stevens, 1 Cush. 468.

³ *Ib.* 469.

in a suit against him for the land, cannot dispute the title of the mortgagee.¹ So it is said,² the Court will not permit the mortgagee's title to be investigated under the proceedings in foreclosure. The Court can only bar the equity of redemption, and will leave the mortgagee to pursue his legal means to establish it.

12. If a mortgagor is in possession at the time of giving the mortgage, the mortgagee may maintain a writ of entry against one who subsequently enters, unless he can show a better title in himself. It is no defence, that the tenant entered under one having a better title than the mortgagee.³ Parker, C. J., says: ⁴ — "The defendant is precluded from asserting the title of the church or of the rector, (under a lease from whom the defendant claimed,) in this case, because it appears that those under whom the demandant claims, have for a long period had actual possession. The actual possession of those under whom the demandant claims continued until the defendant, without any title, saw fit to enter into the premises, under a belief, probably, that although he had no title himself, the party under whom he took his lease had a better title than that of the plaintiff. But under these circumstances the plaintiff, in a real action founded upon his mortgage, is not bound to try the validity of the title of his grantor with the defendant. It is sufficient, upon this issue, that the defendant, without any title, has entered upon the legal seisin of the plaintiff, derived from the actual seisin of his mortgagor."

13. Upon the same general principle, that the suit upon a mortgage is brought substantially to enforce payment of a debt, and does not involve the question of title; it has been held, that such action may be maintained against the assignee of the mortgagor, notwithstanding a lease from the plaintiff, prior to the mortgage, under which the lessee is in possession; the plaintiff being at the time of such lease absolute

¹ Goodtitle v. Bailey, Cowp. 597.

² Coote, 571.

³ Smith v. Edminster, 13 N. H. 410.

⁴ Ib. 413.

owner of the land. Thus a writ of entry was brought on a mortgage made by one Gammon to the plaintiff. Plea, the general issue. The facts were, that the plaintiff, being owner of the premises, leased them for years to Fabyan, who assigned his interest to Thorp, and Thorp was in possession at the commencement of this suit. Between the making and assignment of the lease, the plaintiff gave a warranty deed to Gammon, reserving the right of the lessee; and took back a mortgage to secure the price, a part of which was due. After assignment of the lease, Gammon conveyed to the defendant, subject to the mortgage and lease. Held, the facts furnished no defence to this suit. The Court say:—"Having leased the premises for five years, it may, at first sight, seem inconsistent that he should, within that period, seek to obtain a judgment in his favor for the very property, which he had for that time transferred to other persons; especially as the deed conveying the property to Gammon recognizes the lease and reserves it. But upon considering the object of the mortgage, which is to secure the payment of the purchase-money, we do not apprehend that, under the conditional judgment, any injustice can be done to the defendant, the assignee of the original lessees. By the result of this suit, the plaintiff would not be authorized to disturb the possession of Thorp under the lease. If he would take advantage of any delinquency, as to compliance with pecuniary duties secured by that instrument, it may become necessary for him to enter specially for non-payment of the rent. But whatever redress he may pursue as to the subject of rent, the plaintiff is entitled to maintain his action, and to the conditional judgment as in other cases of mortgage."¹

11. In the case of *Amidown v. Peck*,² which was an action upon a mortgage, the tenant offered to prove, in defence to the action, that the premises were subject to a mortgage, previous and paramount to that of the demandant, and that before this suit was commenced the prior mortgagees had

¹ *Whittier v. Dow*, 2 Shepl. 298, 299; 1 Pow. 166 *a*, n.

² 11 Met. 467.

recovered judgment for possession, to foreclose the right of redemption; which judgment had been reversed on writ of error. This however was held not to be material; for, if it had not been reversed, the tenant, not holding under the prior mortgagee, could not set up his title in defence to this action. But he also offered to prove, that the prior mortgagee still retained possession. It did not appear, however, that the possession was so retained, to the exclusion of the tenant, or otherwise. But it was held, that, if the tenant was not in possession when the action was brought, he should have pleaded a disclaimer in abatement, or specified it as a defence. But, whether the tenant could in any form avail himself of such a defence, if this action was brought for the purpose of foreclosure, might well be doubted. The Court say: — “This process, though in form an action at law, is in fact a suit in equity; because the judgment is conditional. But it is unnecessary to decide this point; as the tenant has not disclaimed all right to possession, but sets up the title and possession of a third party, under whom he has no claim; which cannot, upon any principle, be allowed.”

15. In Vermont, upon the ground that a suit to foreclose a mortgage is to be regarded as a suit for the money due thereupon; it has been held that the defendant may rely upon a *tender*, as in other cases of mere indebtedness. This principle was applied to an action of ejectment, in which the plaintiff claimed title under a decree of divorce, assigning to the plaintiff the demanded premises, as alimony, the assignment to be void upon payment thereof by instalments. The Court say: — “The defence set up is good at law, as well as in equity. If the decree was considered as a mortgage, or in the nature of a mortgage, designed to secure the payment of money, the Court should endeavor so to construe it as to effect the object, namely, the payment of the money, and not to make it operate as a penalty and forfeiture. The common law upon the subject of mortgages is, that there must be a strict performance of the condition, or the estate is forfeited. Hence, a tender after the day could not be taken

advantage of. In this State, after a recovery in an action of ejectment, relief can be had from the Court rendering the judgment, on a petition to redeem. In the action of ejectment, when the plaintiff makes title by a mortgage deed, it is required that the securities mentioned in the condition should be brought into court, to repel the presumption of their having been paid, if not produced. It is a good defence, in such an action, that payment has been made, and, consequently, a tender must be a good defence.”¹

16. Although the strict rules of real actions are in many particulars dispensed with in relation to mortgages, yet it has been held, that such action cannot be maintained upon a mortgage, without proof of actual or constructive *ouster* by the defendant. Thus, November 27, 1827, Rowland and Joseph W. Bancroft mortgaged to Joel Root, the demandant's intestate, and Alvah Stow, one of the tenants, who defends the present suit, the Bancrofts being the other tenants and defaulted. The mortgage was made to secure a note made by Bancrofts to Root for \$136, payable in one year, with annual interest, and two other notes, signed by the Bancrofts and by Stow as surety, each of the same date and for the same sum, with annual interest, one payable in two, the other in three years. The condition of the mortgage was, that Rowland and Joseph W. should pay Root their note for \$136, payable in one year, and also their two notes for the same sum “undersigned by Alvah Stow, one payable in two, and the other in three years, with interest annually.” May 7, 1832, a suit was brought in the names of Root and Stow, upon the mortgage, and at the April term of the Supreme Court, in 1834, judgment recovered for the first note; Stow having paid the others. October 15, 1831, execution issued, but was never committed to an officer, nor did Root take possession of the premises. July 20, 1840, Stow, having an execution against the Bancrofts, levied it upon their equity of redemption, and himself be-

¹ Powers v. Powers, 11 Verm. 262, 263, 264.

came the purchaser, took a deed from the sheriff, and afterwards had exclusive possession. The demandants bring a writ of entry, counting on the mortgage. Held, Root and Stow were tenants in common of the legal estate; that there had been no ouster by Stow, and therefore this action could not be maintained, though a bill in equity might lie, to adjust the interests of the parties in the equitable and beneficial estate.¹ (*e*)

¹ Root v. Bancroft, 10 Met. 44.

(*e*) The technical rules relating to real actions have also been enforced, with reference to a suit for *partition*, brought by the mortgagor.

In the case of *Bradley v. Fuller*, (23 Pick. 1.) it was held, that, where the same person is absolute owner of one half of a tract of land and mortgagee of the other half, the assignees of the mortgagor cannot have partition, as between them and the mortgagee. The Court remarked, (Ib. 9,) "Whether the petition for partition be regarded as a real action, in which the title is drawn in question, or as a suit for possession; it is an adversary suit, and the mortgagee has both the legal title and the right of possession, as against the mortgagor and those who claim under him. A bill to redeem is the proper remedy, and after redemption a petition for partition may be sustained."

In the same case it was held, that, where two tenants in common have severally mortgaged their respective undivided shares to the same person, one of them may have partition against the other before entry by the mortgagee; but the rights of the latter will not be thereby affected.

The following case, more recently decided in Massachusetts, further illustrates the mutual rights of tenants in common of an equity of redemption.

A mortgagor conveyed one undivided half of the land to one person, and the other to another, by deeds simultaneously executed, one of which was recorded immediately. This grantee conveyed, by deed duly recorded, to the plaintiff, after which the grantee of the other half recorded his deed and died. The plaintiff, having become an assignee of the mortgage, brings an action for foreclosure against the mortgagor and the other grantee of the mortgagor, as administrator of the deceased grantee, and recovers a conditional judgment, which is satisfied by the defendant, a purchaser of the title and interest of the deceased pending the suit for foreclosure. Held, the plaintiff might maintain a writ of entry for one undivided half of the land, without contributing towards payment of the mortgage. *Chase v. Woodbury*, Mass. S. J. C., October, 1851; Law Rep. September, 1852, p. 284.

17. Although, as has been stated, there is generally an election of remedies to enforce a mortgage; yet, more especially, perhaps, in those States which have no courts with full equity powers, the general principle applies, that equity will not interfere, where an action at law would accomplish the same purpose. Hence, in Massachusetts, a mortgagee cannot maintain a bill in equity for foreclosure, where, under the circumstances, he would have an adequate remedy at law. (*f*) Thus, in a bill in equity to foreclose a mortgage, the plaintiff alleged, that the land was mortgaged to him by the grantee of the mother of the defendant; that the defendant claimed to hold it, as her heir, discharged of the mortgage, because, when she conveyed to the mortgagor, she had a husband living, who was not a party, nor consenting to such conveyance; that such conveyance was in fact made before her marriage, or, if afterwards, for a valuable consideration, with the defendant's knowledge and consent, and under circumstances, set forth in the bill, which might constitute an estoppel against him. The bill prayed for an account; that the plaintiff's lien might be declared and established, and the defendant decreed to pay the plaintiff his debt and cost by a short day, to be appointed by the Court, the plaintiff reconveying, as the Court should order; that in default of such payment, the right to redeem should be foreclosed; and that the defendant should hold in trust for the plaintiff, subject to the payment of his debt and costs. Held, upon either ground stated in the bill, the plaintiff had a remedy at law, and the bill was dismissed.¹

¹ *Lowell v. Daniels*, 2 Cush. 234.

(*f*) The Court has now full equity jurisdiction. See Gen. Stat.

The obligee in a bond for conveyance of real estate, being in possession, mortgaged the bond, and the mortgagee obtained a conveyance from the obligor, and gave up the bond. The mortgagor files a bill against the obligor and mortgagee, to set aside the transaction. Held, as the plaintiff had suffered no injury, the bill could not be sustained. *Newhouse v. Hill*, 7 Blackf. 584.

CHAPTER XXXI.

FORECLOSURE, ETC. PARTIES TO SUITS UPON MORTGAGES.

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| 1. Parties at law and in equity. | 82. Remainder-men. |
| 2. In equity, all persons interested should be made parties. | 83. Parties, after the death of mortgagor or mortgagee. |
| 4. Application of the rule in case of parties <i>equitably</i> interested. | 102. Guardian. |
| 9. Creditors and debtors. | 105. Husband and wife. |
| 13. Joint mortgagees, &c. | 109. Agent. |
| 27. Assignees and purchasers. | 110. Adverse claimant. |
| 45. Sureties for the mortgage debt. | 113. Rights of joint defendants as to each other; whether their mutual claims shall be adjusted before foreclosure. |
| 51. Other mortgagees; subsequent or prior. | |

1. QUESTIONS relating to the proper *parties* in suits upon mortgages arise chiefly in courts of equity; the rules upon the subject in a court of law being comparatively simple and well defined.

2. In equity proceedings, either for foreclosure or redemption, the general rule is, that, for the purpose of effecting an equitable adjustment among all persons interested in the mortgaged property, *all parties in interest* shall be made also parties to the suit. (*a*) Persons interested in the property,

(*a*) See *Caldwell v. Taggart*, 4 Pet. 190. Also the remarks of the Court in *Goodman v. White*, 26 Conn. 322, an instructive case. *The right of redeeming* has been made the criterion as to proper parties to a suit for foreclosure. Thus Lord Langdale, M. R., says, (6 Beav. 557,) "Considering this a bill of foreclosure, I think that every one of the defendants was a necessary party, because each of them had a right to redeem."

A third person, who executed an absolute deed to the creditor, who executed a defeasance to the debtor, was held a proper, though not necessary party, to a suit to foreclose the mortgage constituted by the two instruments. *Weed v. Stevens*, 1 Clark, 166.

In New York, prior to the Act of May, 1840, all parties having an interest in mortgaged premises being necessary parties to a suit for foreclosure,

but not made parties to the suit, will not in general be bound,¹ nor, on the other hand, can a stranger object to the

¹ See *Yelverton v. Shelden*, 2 Sandf. 574; *Knowles v. Lawton*, 18 Geo. 476; Ch. 481; *Williamson v. Field*, Ib. 533; *Farwell v. Murphy*, 2 Wis. 533; *Hull v. Goodrich*, 2 Staples, 2 Cush. 258; *Calverley v. Phelps*, 6 Madd. 232; *Coote v. Lyon*, 27 Mis. 570; *Howard v. Gresham*, 27 Geo. 347.

and the notice of *lis pendens* being merely to prevent the acquisition of rights in the premises, by third persons, pending the suit; a decree of foreclosure, on a bill filed prior to that act, binds all the parties to the suit, however defective the notice may have been; and, in the absence of an allegation to the contrary, all persons interested will be presumed to have been parties. *Totten v. Stuyvesant*, 3 Edw. Ch. 500.

A. executed a mortgage to secure one debt. B., C., and D. executed a subsequent mortgage to secure the same and another debt. Although the mortgagors held different estates in the mortgaged premises, held, that a bill, by a party to whom both debts had come by assignment, for a sale of the premises, might properly include all these matters, as a definitive decree could not be passed, unless all parties were before the Court. *Fitzhugh v. McPherson*, 9 Gill & J. 51.

A mere formal party in the original bill, whose interests are not affected by the new matter charged in a supplemental bill, need not be made a party to it. *Allen v. Taylor*, 2 Green, Ch. 435.

A. owed a debt to B., which was secured by mortgage, and B. was indebted to C. in an equal amount. C. brought foreign attachment, obtained judgment, made demand of A. on the execution, which was returned unsatisfied, and then brought a *scire facias* and recovered judgment against A., who had no means of payment but the land mortgaged to B. Pending a bill for foreclosure, brought by B., C. make application in chancery to become party thereto, and to stand in B.'s place, and take the benefit of his security. Held, that C. was not entitled to the relief prayed for. *Judah v. Judd*, 1 Conn. 309.

As to making the State a party to a foreclosure suit, see *Pattison v. Shaw*, 6 Ind. 377.

In March, 1848, A filed a bill against the New England Manufacturing Company, for the foreclosure of a mortgage executed by the company to him. In January, 1849, B. presented a petition to the Court, setting forth, that A. when he received the mortgage, gave a declaration of trust, that he received it for the purpose of securing to a certain bank certain drafts drawn by the company on C, and accepted by them, which had been discounted by the bank for the benefit of the company, and that, in case the draft should be paid by C, on account of the company, before the company should

relief prayed for, until regularly made a party.¹ When all parties in interest are before the Court, the decree will be such as to satisfy all their mutual and respective equities.² Thus, where a judgment of foreclosure was recovered by the executrix of the mortgagee, in 1826, in a suit against the mortgagor; and in 1819 the mortgagor had assigned his right of redemption, and the plaintiffs claimed under the assignee: the judgment, as to the plaintiffs, was held *res inter alios*, and the plaintiffs allowed to redeem.³ So, under

¹ McDougald v. Hall, 3 Kelly, 174. Stanton v. Kline, 16 Barb. 9; Ducker

² Moss v. Bratton, 5 Rich. Eq. 1; v. Belt, 3 Md. Ch. 13.

³ Gordon v. Hobart, 2 Sumn. 401.

have placed funds in the hands of C, to meet it, then the bond and mortgage to be held by A in trust to secure to C the amount which should remain due to them on account of their payments made on the drafts, with power to assign the bond and mortgage to either of the parties that might be entitled to the same; that in May, 1847, the petitioner became the owner of sixty-two shares of the stock of the company; that C had the entire control of the Company, and would not allow any answer or defence to the bill; and that nothing was due on the mortgage. Ordered, that the petitioner be permitted, as a stockholder, to answer the bill, and be made and deemed a party thereto. Vandyke v. Brown, 4 Halst. Ch. 657.

If a third person is wrongly made party and discharged from the suit, the mortgagor, not being thereby injured, cannot avail himself of the objection. Martin v. McReynolds, 6 Mich. 70.

An order of the probate court to which the mortgagee was not a party, setting aside the mortgaged premises as a homestead, cannot affect him. Lies v. De Diablar, 12 Cal. 327.

If the mortgagor submits to judgment for foreclosure, no one else can intervene to object. If there is fraud and collusion, the judgment binds only the mortgagor. Sutton v. Sutton, 25 Geo. 383.

A party interested, not made defendant, may, after decree and before foreclosure, bring a bill to determine the amount of the incumbrance and to redeem. And that, although in the foreclosure suit he filed a paper, asking that the land claimed by him should only bear part of the mortgage, which paper was disregarded by the Court. And an agreement by the mortgagor, to include in the decree certain expenses not legally included in the mortgage, cannot affect such party. His land is bound for its share of the costs of foreclosure. But not of the costs of a sale, which was void for want of a seal upon the execution. Bates v. Ruddick, 2 Clarke, 423.

a bill to foreclose a mortgage, a new defendant was brought in, upon an amended bill, to which the original defendant made no answer, but the new defendant answered, alleging fraud in the plaintiffs in obtaining an assignment of the mortgage from him as the original mortgagee. The bill being dismissed as to the plaintiffs, held, the new defendant could not have a decree of foreclosure against the original defendant, the latter not having been made an adversary party to him by motion or cross-bill.¹ So, where parties, claiming to be the trustees of a corporation, executed a bond and mortgage as such, and others, making the same claim, brought a suit against them to establish their rights, and pending that suit the mortgagees brought a bill for foreclosure, and obtained a decree thereon, after which the plaintiffs in the other action were adjudged the rightful trustees; held, the decree of foreclosure was not binding upon the corporation or the rightful trustees, they not being parties thereto; and the decree, and all proceedings subsequent to the filing of the bill were set aside, and the bill dismissed, but without prejudice to the right of bringing a new suit.² And, although one who is made party cannot avoid the foreclosure for non-joinder of another person having an interest, but which does not appear by the pleadings; yet, if he afterwards acquire the interest of the latter, he has a right to redeem.³ (b)

¹ Miller v. McGalligan, 1 Greene, 527.

³ Browitt v. Moor, 12 Eng. Law & Eq. 241. See Mobile, &c. v. Talman,

² Brindernagle v. German, &c. 1 Barb. Ch. 15.

15 Ala. 472.

(b) While the rights of one not made party to the suit cannot be barred by the judgment; a paramount title will not always be affected by a judgment between other parties, although the owner of such title be formally notified of the suit. Thus a prior mortgagee, residing out of the State, was made party defendant to a bill for foreclosure of a second mortgage, brought by an assignee. Not appearing, there was an order of publication, and a decree *pro confesso* against him, and the usual decree for foreclosure of the second mortgage, and a sale, to one having notice of the first mortgage. Held, the first mortgagee might still maintain a bill for foreclosure against the purchaser. Williamson v. Probascio, 1 Halst. Ch. 57.

3. The mortgagor, as well as the mortgagee, must, as a general rule, make all persons interested in the mortgage parties to his bill. Thus, where the mortgagee of a term bequeathed it to trustees, upon trust to sell and divide the produce between thirteen persons by name; held, all the *cestuis que trust* were necessary parties to a bill for redemption, though by the will the trustees had authority to give discharges for the purchase-money.¹ Lyndhurst, Lord Chancellor, says:² — “The case of *Yates v. Hambly*,³ does not, in my opinion, support the application. Lord Hardwicke said in that case, that ‘where a mortgagee, who has a plain redeemable interest, makes several conveyances upon trust in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, there it is not necessary that the plaintiff should trace out all the persons who have an interest in such trust, to make them parties.’ In the present case there does not appear to have been any such intention. The testator directs the property to be sold, and the produce to be apportioned among his children, and one grandchild. They happen to be thirteen in number, but it does not appear to me that that is a sufficient ground for departing from the usual rule.”

4. The case just cited furnishes one of the particular instances, in which the question as to proper parties has been raised. The point of inquiry in this class of cases has been, whether the general rule upon the subject applies to those having a mere *equitable* interest in the land.

5. In New York it has been held, that the *cestui que trust*

¹ *Osbourne v. Fallows*, 1 Russ. & My. 741.

³ 2 Atk. 237. See *Coote*, 589; 1 Dan. Ch. Prac. 255.

² *Ibid.* 743.

Where mortgagees filed a petition to foreclose, and certain defendants answered, claiming liens, and asked for relief, and the mortgagors demurred to the petition; held, it was proper for the Court to proceed and determine the questions concerning the liens, although the mortgagees, after the demurrer had been sustained by the Court, did not amend their petition. *Klönne v. Bradstreet*, 7 Ohio, (N. S.) 323.

of an equity of redemption must be made party to a suit for foreclosure. So one entitled to an equitable vested remainder in fee; in order to bind him by the proceedings. So, although the trustee mortgaged the estate by order of Court. But not those claiming under remote limitations.¹

6. Where a *cestui* brings a bill to foreclose, the trustee must be made party;² and *vice versâ*.³ Leach, V. C., says: "It is his legal estate which is to be protected by the decree of foreclosure, and he is a necessary party to an immediate reconveyance, if the defendant should redeem." So the legal owner of lands, held partly in trust for A., and partly as security for advances made by himself, is a necessary party to a bill, brought by A., to redeem a mortgage, conditioned to satisfy certain incumbrances on the land.⁴ So, where an equity of redemption was conveyed to trustees, upon trust to sell and pay off incumbrances, and divide the surplus among certain parties named in the deed; it was held that the *cestuis que trust* must be made parties to a bill for foreclosure, although, by the deed, the trustees had authority to give valid discharges to purchasers.⁵ Leach, V. C., says:⁶ "The author of the trust has declared that in case of a sale, the presence of the parties beneficially interested in the produce of the sale shall not be necessary; and he had a right to deal as he pleased with his own property; but this declaration has no application to a bill of foreclosure; and the general rule must prevail, that all persons interested in the equity of redemption shall be parties to the suit for foreclosure." So, in the case of a trust for creditors, where their names and demands, though not specified at the time of creating the trust, are subsequently ascertained by their signing a schedule to the conveyance; they must be made parties. Though it is otherwise, where there is a general

¹ *Williamson v. Field*, 2 Sandf. Ch. 533; *King v. McVickar*, 3 Sandf. Ch. 192. See *Coote*, 575; *Tylee v. Webb*, 6 Beav. 557.

² *Wood v. Williams*, 4 Madd. 186.

³ *Davis v. Hemingway*, 3 Mis. 438, contra, *Wright v. Bundy*, 11 Ind. 338.

⁴ *Upham v. Brooks*, 2 Story, 623; *Martin v. McReynolds*, 6 Mich. 70.

⁵ *Calverley v. Phelps*, 6 Madd. 229. See *Tylee v. Webb*, 6 Beav. 557.

⁶ *Ib.* 232.

trust, and the demands of creditors are neither specified in the deed nor subsequently ascertained.¹ So a marriage settlement contained the usual power to appoint new trustees, one of the trustees relinquished his trust, and a memorandum to that effect was indorsed on the settlement, but no new one appointed in his place, and subsequently the remaining trustees loaned the funds on mortgage. Held, the retired trustee was a necessary party to a bill of foreclosure.² Bruce, V. C., says :³ — “ Can a trustee who has once accepted be free from the trust except upon the substitution of some one else in his place ? I think that Bowen ought to be a party.”

7. It is sometimes held, however, that the *cestui* of an equity of redemption need not be made party to a suit for foreclosure.⁴ Thus *cestuis que trust* (bondholders) of a second mortgage are not necessary parties to a suit to foreclose the prior mortgage, in which the trustees are made defendants.⁵

8. It is said,⁶ an exception to the general rule seems to exist, when the *cestuis* are too numerous to be made parties, or the trust is a mere general one for creditors, or the only object is to reduce the property to possession. Thus in case of a bill to enforce a mortgage, against land conveyed to a trustee by a purchaser, subsequently to the mortgage, with notice of it, for the benefit of the creditors of his grantor ; held, the trustee was affected with notice to his grantor, and the creditors need not be made parties.⁷ So, where a mortgage had been assigned to A., in trust for several individuals, it was held not necessary to make the *cestuis que trust* parties to a bill of foreclosure.⁸ So, under the Act of Maryland, 1833, c. 181, a mortgage in trust was executed for the benefit of the payees of certain notes secured by it, the mortgagee, upon default, to make sale, and apply the proceeds to

¹ Coote, 575 ; Swift v. Stebbins, 4 St. and P. 447.

² Adams v. Paynter, 1 Coll. 532.

³ Ib. 534.

⁴ Wood v. Nisbet, 20 Geo. 72.

⁵ New Jersey, &c. Co. v. Ames, 1 Beasl. 507.

⁶ Coote, 589.

⁷ Willis v. Henderson, 4 Scam. 13.

⁸ Sill v. Ketchum, Harr. Ch. 423.
See Sale v. Kitson, 15 Eng. Law & Eq. 590.

the debt and interest. Held, that by the third section of that act the mortgagee was the proper person required to make the statement and affidavit, and that it was not necessary for the payees in the notes to be made parties to the proceedings under the act.¹ And, on the other hand, it is said, if there be fraud or collusion to the detriment of third parties, as if assignees or executors or trustees refuse to enforce their right, creditors, legatees, or other parties interested may file their bill for relief.²

9. The question sometimes arises, whether *judgment creditors* of the mortgagor shall be made parties. (c)

10. It has been held in England, that subsequent judgment creditors must be made parties to the bill for foreclosure. It is not enough to serve them with copies of the bill, under the 23d of the orders of August, 1841.³ Bruce, V. C., says: ⁴ — “It appears upon the face of the bill or is otherwise admitted, that there is a *puisne* mortgagee, or incumbrancer of that nature, who is a party to the bill, and that there are judgment creditors of the mortgagor intervening between the first and second mortgagee. Ever since I have known anything of this Court, such intervening incumbran-

¹ Hays v. Dorsey, 5 Md. 99.

² Coote, 588; Sill v. Ketchum, Harr. Ch. 423.

³ Adams v. Paynter, 1 Coll. 430,

contrá, Person v. Merrick, 5 Wis. 231;

Hendry v. Quinan, 4 Halst. Ch. 534.

See Hilt v. Holliday, 2 Litt. 332.

⁴ Adams v. Paynter, 1 Coll. 432.

(c) It has been held in Vermont, that, in a bill for foreclosure, it is neither necessary nor proper to make a mere *attaching creditor*, who has not recovered judgment, a party. Downer v. Fox, 5 Washb. 388. On the other hand, it is decided in Connecticut, that a decree of foreclosure will not affect the rights of the attaching creditor, unless he be made a party. Hence, if the creditor afterwards recover judgment, and levy execution on the premises, he may redeem, notwithstanding the foreclosure. Lyne v. Sanford, 5 Conn. 544. See People's, &c. v. Hamilton, &c., 10 Paige, 481; Loomis v. Stuyvesant, 10 Paige, 490.

To a bill by the heirs of an insolvent to set aside a sale, under the insolvent laws of Louisiana, of mortgaged property, the mortgage creditors, though averred by the bill to be out of the jurisdiction of the Court, are necessary parties. Coiron v. Millaudon, 19 How. U. S. 113.

cers have always been considered necessary parties to a bill of foreclosure. Cases of judgments confessed *pendente lite*, cases of fraud, cases of parties inconveniently numerous, may possibly exist in such a manner as to form an exception to the rule; cases of judgments *pendente lite* generally do. But this is not that description of case. It is said that these persons are parties. If so, the bill is in this situation; it is brought to a hearing against several defendants, some of whom have not answered. Generally such a bill, unless process has been exhausted, cannot be heard." And the foreclosure of a mortgage, without making the holder of a judgment lien a party, is, as to such holder, held a nullity.¹

11. But where a mortgagee seized and sold on execution property sufficient to satisfy a judgment for the mortgage debt, and, the mortgagor having become bankrupt, the mortgagee was enjoined from applying the proceeds to his judgment, until he should have exhausted his mortgage: Held, the mortgagee might maintain a bill to foreclose against a purchaser from the assignee of the premises, without joining the junior judgment creditors of the mortgagor.² And it is held that a bill, filed for the purpose of obtaining a sale of mortgaged premises, need not allege that there are no creditors or subsequent purchasers, nor make them parties, although the mortgage has not been legally registered. Such parties claim in different rights, have no connection whatever with the mortgage, and cannot be affected by any decree in the case.³ (*d*)

12. To a bill for foreclosure of a mortgage, given by replevin bail to the creditor, as security for the debt claimed, the judgment *debtors* in the judgment recovered by the

¹ Brainard v. Cooper; 10 N. Y. (6 Seld.) 356.

² Felder v. Murphy, 2 Rich. Eq. (S. C.) 58.

³ Mims v. Mims, 1 Humph. 425.

(*d*) If, pending a bill to foreclose, the land is sold under junior executions, the purchaser need not be made a party; though it seems he may become a party if he so desires. Bennett v. Calhoun, &c. 9 Rich. Eq. 163.

mortgagee should be made parties; and, if they are made parties, and one of them dies pending the bill, his heirs and representatives should be made parties by bill of revivor.¹ (*e*)

13. Another question as to parties arises from the *joint* interests of several persons, as mortgagors or mortgagees.²

14. It is said, if two estates are comprised in one mort-

¹ Milroy v. Stockwell, 1 Smith, 19.

² See Farwell v. Murphy, 2 Wis. 533.

(*e*) As judgment creditors of the mortgagor may be proper parties to a suit on the mortgage, so a mortgagee may sometimes be made party defendant to a suit in equity by a creditor of the mortgagor. The following decision illustrates the proper course of proceeding in such a case.

In Maryland, where a mortgagee is made defendant to a creditor's bill filed for the sale of an equity of redemption and other property, and assents in his answer to a sale, a sale may be decreed for payment of the mortgage debt; and this without giving time to the owners of the equity for such payment. The Act of 1782, sect. 3, requires that time be given only where the mortgagee applies for foreclosure. *Gibson v. McCormick*, 10 G. & J. 65. The Court say, (*Ib.* 101, 102): — "A decree between co-defendants, grounded upon the pleadings between the complainants and defendants, may be made, and it is the constant practice of the Courts so to do, to prevent multiplicity of suits. But such decree between co-defendants, to be binding upon them, must be founded upon, and connected with, the subject-matter in litigation between the complainant and one or more of the defendants. The assent of the mortgagee had been given, the mortgage had been long forfeited, a sale of the equity of redemption could not be resisted; then why sell the equity of redemption, subject to the outstanding mortgage, to the manifest injury of the creditors of the deceased, and to the parties to this suit, and to the multiplication of litigation, by sending the purchaser, before he could realize the benefits of his purchase, into a court of equity with his bill to redeem? The bill is filed by a general creditor of the mortgagor. Such a creditor is not to be delayed in the remedy he seeks, by giving time to the mortgagor. The design of the legislature, was to give to the debtor an opportunity of superseding the necessity for the sale. Would giving time, and payment of the mortgage, remove the necessity for such sale in the case before us? Certainly not. The sale must still be decreed for the payment of the general creditors. So far as a sale is decreed for the payment of the mortgage debt, it is a mere incidental consequence to the decree."

gage, and the equities of redemption devolve on different parties; the equitable owner of one cannot maintain a bill to redeem without making the other owner a party to the suit. And that the same rule applies to two distinct mortgages of different estates for different sums to the same mortgagee, and a subsequent severance of the equity of redemption.¹ So, in case of a mortgage to the defendant, a second mortgage to another person, and a third to the second mortgagee and the two plaintiffs; the second mortgagee assigns his interest in both mortgages to the defendant, who, before maturity of his notes, enters for non-payment of interest. Held, the plaintiffs were rightly joined in a bill to redeem the two first mortgages.² (*f*)

15. Several mortgagees, who are joint tenants of the same property, must be parties to a foreclosure.³ So, when one party receives a mortgage in his own name for a partnership debt, he must join the others in a bill to foreclose.⁴ So, on a bill to foreclose, brought by one of two mortgagees, each having lent a certain sum on the mortgage; held, there could be no foreclosure or redemption, unless both creditors were before the Court.⁵ And where a joint mortgage was made to two persons, to secure several debts: held, they might properly file a joint bill for foreclosure, and have a decree for a sale. A distinction was taken between this process, of resorting to the land, and a personal suit for the debt, which

¹ Coote, 602, 603.

² Saunders v. Frost, 5 Pick. 259.

³ Lowe v. Morgan, 1 Bro. 368.

⁴ Noyes v. Sawyer, 3 Verm. 160.

⁵ Palmer v. Carlisle, 1 Sim. & St. 423.

(*f*) Also, that the defendant could not be compelled to contribute in paying off the two first mortgages, but, if he did not, and the plaintiffs alone redeemed them, he could not avail himself of his interest in the third mortgage, but the plaintiffs would be entitled to possession till reimbursed his proportion. And, if the defendant elected to hold under the third mortgage, that he should contribute to the redemption of the other, in the proportion that his interest in the third had to the interest of the two other mortgagees. Ibid.

must be several where the subject matter is so, even though the covenant is in terms joint.¹ So where, on a bill to foreclose, only one of the two mortgagees was made party, and it did not appear that the other appeared or was served with process; though the bill was taken as confessed and a sale decreed, the decree was reversed.² So where the purchaser of land, owned by several persons, gave separate mortgages to secure the several shares of the purchase-money, each including the whole land purchased, and all simultaneously executed and delivered; held, the holder of one mortgage could not file a bill for the foreclosure of his mortgage alone, unless the holders of the others should refuse to join with him; and upon such refusal, he should file a bill, making them defendants, and setting forth all the circumstances attending the execution of the mortgages.³ So where a mortgage is made to secure several notes, and the holder of the one which matures last files a bill for foreclosure, he must either allege that the others are paid, or make the holders of them parties. If the notes are payable to different persons, a bill, filed by one not the mortgagee, must distinctly allege that he holds all of them.⁴

16. And one of several mortgagees or assignees of a mortgage, who hold mortgage notes, may join the others with him in a suit at law upon the mortgage, upon giving security for costs. It is doubtful, whether he could maintain such suit alone.⁵

17. Non-joinder of joint mortgagees in a suit for foreclosure may be taken advantage of on the general issue, notwithstanding a statutory provision that "persons claiming the same premises as joint tenants, &c., may join—or any one may sue alone for his particular share." This only contemplates a mode of severing the joint tenancy. No proper conditional judgment can be rendered in favor of one tenant.⁶

¹ *Shirkey v. Hanna*, 3 Blackf. 403;
contra, *Thayer v. Campbell*, 9 Mis. 280.

² *Stucker v. Stucker*, 3 J. J. Mar. 301.

³ *Potter v. Crandall*, 1 Clark, 119.

⁴ *Hartwell v. Blocker*, 6 Ala. 581.

⁵ *Johnson v. Brown*, 11 Fost. 405.

⁶ *Webster v. Vandeverter*, 6 Gray,
428.

18. In case of an assignment of property mortgaged, to the mortgagee and another as trustees, for payment of the mortgage and other debts; if the mortgagee bring a suit to foreclose, the other trustee must be joined as defendant.¹

19. Where a mortgagee, after entry for condition broken, made an absolute conveyance of the premises, in distinct parcels, to two others; they were held to be properly joined as defendants in a bill to redeem.²

20. If the estates of two persons are included in one mortgage, both must be made parties to a bill of foreclosure. So if the equity of redemption be severed after the mortgage.³

21. It is irregular to proceed on a bill to foreclose a mortgage against one, when another is in possession under his claim.⁴

22. Contrary to the general rule, it is held, that, where one mortgage is made to secure several debts, each creditor has a right of action and may foreclose alone. Nor can he join the others as party defendants.⁵ (g) So where a mortgage is given to two persons, to indemnify them against a joint liability, one of them, who has alone been damnified, may file a bill to foreclose the mortgage, without joining the other mortgagee.⁶ So a purchaser of part of the mortgaged property, from the mortgagor and one of several mortgagees, is not a necessary party to a suit, by a purchaser of the equity

¹ *Paton v. Murray*, 6 Paige, 474.

² *Wing v. Davis*, 7 Greenl. 31.

³ *Coote*, 557. See *Roswell v. Simon-*
ton, 2 Cart. 516.

⁴ *Madeiras v. Catlett*, 7 Mon. 475.

⁵ *Thayer v. Campbell*, 9 Mis. 280.

⁶ *Rodgers v. Jones*, 1 McClel. Ch.
221.

(g) An executor brought suits on notes secured by mortgage, averring that the notes ran to his testator and two others, and the mortgage to his testator alone, for the use of the three, and that by some assignment unknown to him, the title passed to his testator; the two others interested were made co-defendants; and upon default judgment for foreclosure went against all. Held, that the default admitted the existence of a good assignment; that the entry of judgment against the two was a clerical misprision, working no injury, and therefore no cause for reversal. *Eggleston v. Barnes*, 12 Ind. 604.

of redemption of the residue of the property, to subject the residue to payment.¹ So where a mortgagor transfers the land to two or more persons, if they resist the mortgagee's entry, or drive him to an action to foreclose, each is a deforciant of the whole. If the mortgage include different closes, which the mortgagor conveys to different persons, who hold them in severalty, the mortgagee must bring several actions to foreclose; but is entitled to judgment in each, unless the whole debt be paid. If either grantee pay the whole, the mortgage is discharged, and he may claim contribution from the other.² So a mortgagee of an undivided part of land may maintain a real action to foreclose, against one holding by purchase from the mortgagor the other undivided part as tenant in common.³

23. It has been sometimes held, that representatives of deceased joint mortgagees must be made parties.⁴ But it is also held, that a surviving joint mortgagee may bring a suit for foreclosure.⁵ And the prevailing rule seems to be, that, after the death of a joint mortgagee, a suit to foreclose is to be brought by the survivor alone, unless an interest is disclosed in some other person; and that the representatives of the deceased are not proper parties. Though it is held that the objection to such joinder must be by demurrer, not at the hearing, nor on error.⁶ (*h*)

24. Where one of joint mortgagors, who are also partners, and who have conveyed the mortgaged premises, dies pending a foreclosure suit, his heirs or personal representatives

¹ *Winfrey v. Williams*, 5 B. Mon. 428.

² *Taylor v. Porter*, 7 Mass. 355.

³ *Olney v. Adams*, 7 Pick. 31.

⁴ *Smith v. Trenton, &c.*, 3 Green, Ch. 505.

⁵ *Williams v. Hilton*, 35 Maine, 547.

⁶ *Milroy v. Stockwell*, 1 Cart. 35; ——— *v. Ferguson*, 5 Ala. 158; *Martin v. M'Reynolds*, 6 Mich. 70.

(*h*) In Texas, the District Court has power to decree the foreclosure of a mortgage so far as the interest of one of two joint mortgagors is concerned, without including the interest of the legal representatives of another joint mortgagor. *Wiley v. Pinson*, 23 Tex. 486.

need not be made parties, as the debt survives against the others.¹ But in case of a mortgage by A. to secure a judgment against B. and C., if a suit be brought for foreclosure, to which B. appears, and dies pending the suit, A. and C. being defaulted, the suit cannot properly be abated as to him, and a decree entered against them; but a bill of revivor must be filed, making his representatives parties, before any sale is ordered.²

25. In case of *partition* between joint mortgagors, the only effect seems to be, that the mortgagee must bring his suit against the proper parties. His rights under the mortgage are not in any way affected.³

26. A suit in equity to foreclose a mortgage does not lie against parties to the note, but who are not parties to the mortgage, as joint defendants.⁴ So where a mortgage of indemnity is given to a surety upon a note, the payee need not be made party to a suit for foreclosure.⁵ But in a suit for foreclosure brought by an administrator, an assignee of a mortgage note may be joined with the mortgagor as defendant.⁶

27. The *assignment* of the interests of mortgagor or mortgagee also gives rise to questions as to the proper parties to a suit. (i)

¹ Cullum v. Batre, 1 Ala. N. S. 126.

² Milroy v. Stockwell, 1 Cart. 35.

³ Hull v. Lyon, 27 Mis. 570.

⁴ Wilkerson v. Daniels, 1 Iowa, 179; Coote, 354.

⁵ De Cottes v. Jeffers, 7 Flor. 284.

⁶ Armstrong v. Pratt, 2 Wis. 299.

(i) In a *writ of entry* to foreclose a mortgage, the demandants count against the assignee as the immediate wrongdoer, and not as having entered by the mortgagor; because he holds subject to the mortgage, has a right to redeem, and a good title against all but the plaintiff. Taylor v. Porter, 7 Mass. 357. In Lewis v. Babb, 15 Mass. 488, the tenants showed by their plea, that the demandant's only title was under an assignment of a mortgage, and that they were assignees of a second mortgage of a part of the same tenements. Held, there should be conditional judgment for a part, and absolute judgment for the rest. The Court remarked, that it was better for the tenants to seek their remedy by bill in equity.

The assignee of a mortgage is a necessary party to a suit for redemption,

28. It is said, that, where the mortgagor concurred in the assignment of the mortgage, the mortgagee need not be made party to a bill for redemption; which otherwise may be the case, that he may account for the profits received in his time.¹ So, in general, an assignee of a mortgage need not make the mortgagee or a mesne assignee a party to his bill,² even though the assignment was made by an unsealed instrument, and therefore the legal title remains in the mortgagee,³ or though the mortgagee has guaranteed the mortgage debt,⁴ or has entered and received the rents and profits,⁵ provided the assignment was *absolute and unconditional*, divesting the mortgagee of all interest and all liability.⁶ So where the assignment was intended to give the assignee the right of receiving the mortgage money, to foreclose in his own name, and apply the proceeds to certain debts for which the assignee was liable, as surety for the mortgagor; it is not necessary to make the assignor or the creditors parties to the suit. Otherwise, where the mortgage is assigned as mere security for a debt, though not so expressed in the assignment.⁷ Or only a part of the mortgage debt is assigned.⁸ Or where the mortgagor *leased* to the mortgagee.⁹ But where a mortgagee in possession has given an absolute lease of the premises, reserving rent, he or his assigns must be parties to

¹ Coote, 354.

² *Ib.* 577.

³ Parker v. Stevens, 2 Green, Ch. 56. See Pridgen v. Andrews, 7 Tex. 461; Browning v. Clymer, 1 Smith, 298.

⁴ Hosford v. Nichols, 1 Paige, 220.

⁵ Whitney v. McKinney, 7 Johns. Ch. 144.

⁶ Grant v. Ludlow, 8 Ohio, N. S. 1.

⁷ Kittle v. Vandyck, 1 Sandf. Ch. 76; Muller v. Henderson, 2 Stockt. 320.

⁸ Christie v. Herrick, 1 Barb. Ch. 254; Coote, 577; Hobart v. Abbot, 2 P. Wms. 643; Johnson v. Hart, 3 Johns. Cas. 322. See M'Guffey v. Finley, 20 Ohio, 474; Newman v. Chapman, 2 Rand. 93; Morgan v. Magoffin, 2 Bibb, 395; Ward v. Sharp, 15 Verm. 115; Western, &c. v. Potter, 1 Clark, 432; Walker v. Bank, &c. 6 Ala. 452.

⁹ Wolcott v. Sullivan, 1 Edw. Ch. 399.

though the assignment is alleged to be fraudulent. Thus, A. assigned a lease to B., who afterwards assigned to C. In a suit by A. to redeem, on the ground that the assignment from him to B. was a mortgage; held, C. was a necessary party, though it was stated, at the argument on appeal, that the assignment to C. was fraudulent. *Hickock v. Scribner*, 3 Johns. Ch. 311.

a bill against the lessee to redeem.¹ And, in general, it is said, the mortgagee must be made party, unless *his whole interest* is divested.²

29. Where a mortgagee, who has assigned his mortgage *for security*, is not made party to the proceedings for foreclosure against the original mortgagor, and none have been instituted for the purpose of divesting his own right, such right remains unaffected, and the mortgage created between him and the assignee continues alive and subject to redemption.³

30. The plaintiff having an assignment of a first mortgage, and also a second mortgage, and the plaintiff and one Buck being assignees of a subsequent mortgage of part of the land, and the defendant having a still later mortgage of the whole; the plaintiff brings a bill in equity to redeem, setting forth the above title. Held, the action might be maintained, without joining Buck as plaintiff, the plaintiff having a legal, though not the entire interest as assignee; that his redemption would enure to the benefit of all his co-tenants; that he could redeem only by paying all claims of the defendant under the prior mortgage, to the same extent as would have been paid, if Buck were a party; and therefore the defendant could sustain no injury.⁴

31. In case of assignment *pendente lite* by both parties, there must be a bill of *revivor*.⁵

32. If, in a bill brought by an assignee, the defendant relies in his answer upon the interest of the mortgagee, the bill is not made good by a subsequent release in full to the plaintiff.⁶

33. The assignee of one of several bonds, secured by a mortgage, must be made party to a bill for foreclosure, though it alleges that such bond may be presumed, from lapse of time and other causes, to have been paid.⁷

¹ *Dias v. Merle*, 4 Paige, 259.

² *Worthington v. Lee*, 2 Bland, 682.
See Md. L. 187, 213, 1261.

³ *Slee v. Manhattan, &c.*, 1 Paige, 56.

⁴ *Platt v. Squire*, 12 Met. 494.

⁵ *Van Hook v. Throckmorton*, 8 Paige, 33.

⁶ *Kittle v. Van Dyck*, 1 Sandf. Ch. 76.

⁷ *Bell v. Shrock*, 2 B. Mon. 29.

34. Where a defendant, in a suit for foreclosure which had been abated by lapse of time, was in possession of part of the land, and made a mortgage to a non-resident, who was made party to the bill of revivor for foreclosure, but never had actual notice of the *lis pendens*, and the non-resident mortgagee assigned his mortgage; held, his assignee could file a supplemental bill in the nature of a cross-bill, and pray for a foreclosure of his own mortgage, as well as a cancellation of the first mortgage, upon which the foreclosure suit was founded; and the bill was not bad for multifariousness.¹

35. Where the plaintiff in a judgment creditor's bill seeks to reach the moneys due upon a mortgage, which he alleges has been fraudulently assigned by the debtor, the assignee must be made party, though residing out of the State; and a decree, made upon a bill filed against the debtor and mortgagor alone, adjudging the assignment to be fraudulent, and setting it aside, is erroneous, if seasonably objected to.²

36. After assignment of a mortgage, the mortgagee cannot foreclose by advertisement.³ And even where a mortgagee brings a suit to foreclose in the name of an intermediate assignee; if the mortgagee afterwards take a re-assignment to himself, he is not estopped to dispute the validity of the foreclosure, in a subsequent bill against a purchaser under such foreclosure.⁴ So, where the mortgagee assigned all his interest in the mortgage, and afterwards brought suit against the mortgagor, obtained judgment as on the mortgage, and entered under it; held, the act was entirely nugatory as to the mortgagor and those claiming under him, and that no foreclosure could take place by reason thereof.⁵

37. With regard to the effect of an assignment by *the mortgagor* upon the question of parties, it has been held, that a purchaser from the mortgagor, filing a bill to redeem, must join the mortgagor as a party.⁶ But a purchaser of an equity

¹ Whitbeck v. Edgar, 4 Sandf. Ch. 427.

² Gray v. Schenck, 4 Comst. 460.

³ Cushing v. Ayer, 25 Maine, 383.

⁴ The Cohoes, &c. v. Goss, 13 Barb. 137.

⁵ Call v. Leisner, 23 Maine, 25.

⁶ Clark v. Long, 4 Rand. 451.

of redemption, at a sale on execution, need not make the mortgagor a party to a bill to redeem.¹

38. The mortgagor must be made party to a bill for foreclosure, unless he has assigned his equity of redemption,² in which case he is said to be a proper, though not a necessary party.³ More especially where the mortgagor sells the premises and the purchaser assumes the payment of the mortgage, and gives his bond for the amount; the mortgagor need not be made party to an action to foreclose,⁴ unless he warranted the title.⁵ So, after a conveyance by the mortgagor, a suit for possession, by a purchaser under a power of sale mortgage, should be against the grantee, and it is not necessary to join the mortgagor.⁶ But it is held, that there should not be a decree against the alienee of a mortgagor without making the latter, if alive, or his administrator, executor, or heirs, if he be dead, a party.⁷ So, pending a suit to redeem from a mortgagee in possession lands which he claimed absolutely, the mortgagor assigned his interest for the benefit of creditors. The assignee thereupon filed a supplemental bill. Held, he should make all parties to the original bill, whether plaintiffs or defendants, parties to the supplemental bill.⁸ And the general rule is laid down, that an assignee of any right of the mortgagor should be joined in a suit for foreclosure, but is only subject to costs occasioned by his own separate defence.⁹ So, where an equity of redemption has been sold on execution, the mortgagor, having a year to redeem, must be made party to a bill to foreclose, brought within that time.¹⁰

39. It is the general rule, that, in a suit to foreclose a mortgage, the owner of the equity of redemption must be made defendant, otherwise he will not be bound by the decree; and it is held that the mortgagor may state the objection

¹ *Thorpe v. Ricks*, 1 Dev. & Bat. Ch. 613.

² *Lane v. Erskine*, 13 Ill. 501.

³ *Chester v. King*, 1 Green. Ch. 405; *Kneeland v. Tombat*, 1, 104.

⁴ *Vannest v. Latson*, 19 Barb. 604; *Shaw v. Hoadley*, 8 Blackf. 165; *Lockwood v. Benedict*, 3 Edw. Ch. 472.

⁵ *Bigelow v. Bush*, 6 Paige, 343.

⁶ *Buchanan v. Munroe*, 22 Tex. 537.

⁷ *Hundley v. Webb*, 3 J. J. Marsh.

⁸ *Borst v. Boyd*, 3 Sandf. Ch. 501.

⁹ *Luning v. Brady*, 10 Cal. 265.

¹⁰ *Hallock v. Smith*, 4 Johns. Ch. 649.

that the purchaser is not made party, though the conveyance to him was not recorded before commencement of suit.¹ So, though the mortgagor is still liable for the debt.² So the mere fact, that the deed of a grantee of the mortgagor was never recorded, does not make a foreclosure decree against his grantor binding on him, when not made a party.³ Thus a grantee, whose deed was not recorded, before and at the time of the sale, gave notice that he was not bound by the decree, because not made a party, and that all purchasers must take, subject to his right to redeem. Held, that he was not bound by the decree and sale, and so might redeem from the purchaser. And a verbal notice, given to the attorney of the party against whom redemption is sought, is sufficient.⁴ (*j*)

40. But where a mortgage is made of several tracts, one of which has been previously conveyed by the mortgagor, the grantee need not be made party to a bill for foreclosure.⁵ Nor the grantee of one of several tracts included in a mortgage, but against which the mortgagee does not proceed in the suit.⁶ So, if the suit is brought against the mortgagor, it is an insufficient plea, that he has legally assigned the equity, without adding a delivery of the assignment, and acceptance by the assignees of the trusts and conditions.⁷ (*k*)

¹ *Hall v. Nelson*, 23 Barb. 88; *Shackelford v. Stockton*, 6 B. Mon. 390; *Glidden v. Andrews*, 10 Ala. 166. See *Chardron v. McGee*, 8 Ala. 570; *Bradley v. Snyder*, 14 Ill. 263; *Brundred v. Walker*, 1 Beas. 149; *Hatfield v. Maier*, 13 Cal. 13; *Veach v. Schaup*, 3 Clarke, (Iowa) 194; *Hodson v. Treat*, 7 Wis. 263.

² *Reed v. Marble*, 10 Paige, 409.

³ *Hodson v. Treat*, 7 Wis. 263.

⁴ *Ibid.*

⁵ *Comley v. Hendricks*, 8 Blackf. 189.

⁶ *Hosford v. Nichols*, 1 Paige, 220.

⁷ *Whitlock v. Fisk*, 3 Edw. Ch. 131.

(*j*) In a suit against a mortgagor and his assignee, to foreclose the mortgage, the mortgagor, in his answer, set up an agreement by the assignee to pay the mortgage debt. The bill was taken as confessed against the assignee, and was heard upon bill and answer as against the mortgagor. Held, that the Court could not, on a summary application by the mortgagor, decree payment of the mortgage debt by the assignee, upon the foot of the decree in the foreclosure suit. *Jones v. Grant*, 10 Paige, 348.

(*k*) A subsequent purchaser, who is served in a foreclosure suit, and who

41. Notwithstanding the general rule above stated, it is sometimes held that a judgment of foreclosure binds not only the mortgagor, but also his vendee, though he is not a party to it.¹ (l) So a sale under a judgment upon *scire facias*.²

42. In *Watson v. Spence*,³ there had been a foreclosure of the mortgage and a sale under it, the mortgagor having parted with his interest before the bill was filed, and his vendee not having been made a party. It was held, that the proceedings in chancery were void as to the vendee of the mortgagor, and, as he could have maintained ejectment before the foreclosure against a stranger, he could do the same after foreclosure, although the defendant was a purchaser under the chancery proceedings. The decision proceeded upon the ground, that the defendant acquired no interest in the land, except as against the mortgagor; that he had no privity with the mortgagee, and could not be treated as an assignee.

43. But in *Frische v. Kramer*,⁴ the Court in Ohio dissent from this decision, and remark substantially as follows: ⁵ — “The right of redemption continues until the land is sold under a proceeding in chancery. After condition broken, the mortgagee may maintain ejectment for the land, against the mortgagor or any one claiming under him. He may file his bill in chancery for a foreclosure, or for a decree ordering a sale. To this bill he must, or ought to make the mortgagor a party. And he ought, further, to make all persons parties, who have acquired interests in the property, either anterior,

¹ *Knowles v. Lawton*, 18 Geo. 476.

⁴ 16 Ohio, 125.

² *Dennison v. Allen*, 4 Ham. 500.

⁵ 16 Ohio, 138, 139, 140.

³ 20 Wend. 260.

purposely makes default, intending to protect his interests at the sale, and then attends the sale, is bound by the decree and sale. *Babcock v. Perry*, 8 Wis. 277.

(l) Where a vendee, having a mere bond for title, gives a mortgage, the vendor need not be made party to a suit for foreclosure, and is not bound by a decree. *Pridgen v. Andrews*, 7 Tex. 461.

or posterior to the date of his mortgage. But suppose he does not, and a decree passes, what is the consequence? If the Court have jurisdiction, all parties before it will be bound by the decree. As to those not parties, the decree does not affect them; their interests remain as they were. When the bill is filed, the legal title, as between parties and privies, is in the mortgagee. The object of the bill is, that this may be sold, divested of any equity of redemption. And it seems clearly to the Court, that when it is sold, the purchaser takes the interest, not only of the defendants in the case, but the interest of the mortgagee; and that he takes it divested of any right of redemption on the part of those who are parties to the proceeding. So far as the land is concerned, he is subrogated to all the rights of the mortgagee. A junior vendee of the mortgagor, under such circumstances, cannot recover in ejectment against the purchaser at the judicial sale. True, his interests are not affected by the decree and sale. Still, the decree is not a nullity. As to the mortgagee and those claiming under him, he has, and never had any other interest than a mere equity of redemption. That right still remains. He may have a bill to redeem, but he cannot sustain an ejectment."

44. In an action of ejectment,¹ the plaintiffs claimed under a deed from Richardson to Polhemus, one of the plaintiffs, dated in April, 1796; and under a sheriff's deed to Watson, the other plaintiff, dated April, 1801, and founded upon an execution sale on a judgment rendered in 1797, in favor of Watson and Richardson. It appeared that Richardson purchased of Bridgen, and on the 12th of February, 1795, mortgaged back to secure a bond for the price. In February, 1803, the bond and mortgage were assigned to Munro, who in 1807 filed a bill for foreclosure against Richardson alone; and obtained a decree for foreclosure and sale, under which the premises were sold to Morris, subject to all adverse claims. The defendant claimed under Morris. The plaintiffs objected to the evidence of foreclosure, on the ground

¹ 20 Wend. 260.

that they were not made parties to the suit. Held, the action might be maintained upon this ground. The Court say: — “ Up to the time of foreclosure, the mortgagor, notwithstanding he may have assigned the equity of redemption, has a right to pay the money, in respect to the privity of contract between him and the mortgagee. He is most commonly holden to pay, not only by the mortgage, but by bond or note, &c., and for the complete perfection of the title must be made a party. But after he has sold out, of what avail is the payment? It might discharge his personal debt; but I cannot perceive that any power of redemption remains to him in his own right. The act of payment must enure to the benefit of the person owning the equity of redemption. All right to the land had gone from Richardson, when Munro came with his bill. At law, the fee was in Munro, as the assignee of Bridgen, the mortgagee; in equity and at law, it had passed from Richardson by his deed to Polhemus, or by the sheriff’s sale to Watson; Munro might claim at law as standing in the place of the mortgagee. He might assign his legal right. But it is not perceived how a decree of strict foreclosure, on a bill filed against Richardson, could have added anything to Munro’s right. He would, in that case, have himself sold and deeded to Morris, instead of leaving that to be done by a Master; and a title thus passing down to the defendant would perhaps have connected him with Bridgen, by deeds enuring as consecutive assignments of his interest as mortgagee. In this way the defendant might have maintained his possession, as assignee *pro tanto*, although the decree should be disregarded as a nullity. But the rights of Munro as mortgagee never passed from him. He obtained a decree which was a nullity, because against a mere stranger. This void decree directs an account and foreclosure, a sale and deed by a Master; the latter equally void, of course, with the decree from which it emanated.”

45. The Revised Statutes of New York (*supra*, chap. 27,) authorize the making of any other person besides the mort-

gagor, party to a bill for foreclosure, where the mortgage debt is secured by the obligation or other evidence of debt of such person, and provide that the Court may decree payment of the balance, if any remain after a sale, against him as well as the mortgagor. It has been held, that this act applies as well to one who guarantees payment of the mortgage after the making of it, as to one originally and collaterally liable for the debt. Thus it applies to the case where the mortgagee has assigned the mortgage, and guaranteed the debt to the assignee. It seems, in such case, the mortgagee is a proper party defendant, independently of the statute.¹

46. The holder of a mortgage assigned it, and covenanted with the assignee, that it was due and collectable. He afterwards took the bond of a third person as security for the mortgage debt. Held, the assignee was in equity entitled to the benefit of this security, and, in a suit by him to foreclose, that the obligor was properly joined as defendant, in order that a decree might be made against him for any deficiency after sale of the property.² So, where the purchaser of a portion of land mortgaged assumes the whole mortgage, the mortgagee is entitled to the benefit of this contract; and to a decree in equity against such purchaser, under the above statute.³

47. The above provisions do not apply, where the plaintiff had no right to come into Court to foreclose, as against the interest of any one in the premises or any part thereof. Thus they do not apply, where the bill is dismissed as to the whole property, on the ground of usury.⁴

48. One who sells a bond and mortgage for less than the sum due upon it, and guarantees the whole debt, may be made party to a bill of foreclosure; and a decree may be made against the mortgagor for the deficiency left after foreclosure and sale; also, that if it cannot be collected from

¹ *Bristol v. Morgan*, 3 Edw. 142; *Leonard v. Morris*, 9 Paige, 90.

² *Curtis v. Tyler*, 9 Paige, 432.

³ *Halsey v. Reed*, 9 Paige, 446.

⁴ *Mann v. Cooper*, 1 Barb. Ch. 185.

him on execution, the guarantor shall make it up to the extent of his obligation, including the costs of foreclosure and sale, and shall have the benefit of the decree against the mortgagor to indemnify him.¹

49. To a bill by a mortgagee, to restrain a sale by attaching creditors, a surety for the mortgage debt need not be made party.²

50. A principal debtor and a surety for the debt executed each a separate mortgage to secure it. The former transferred his estate, and removed out of the jurisdiction of the Court, and the mortgagee brings a suit to foreclose the mortgage of the surety. Held, the principal debtor was not a necessary party.³

51. The question often arises, whether, in a suit relating to a mortgage, other mortgagees, prior or subsequent, are to be made parties. Upon this subject, the practice is not wholly uniform, nor the authorities quite reconcilable.

52. It is said, "a mortgagor, filing his bill to redeem, is bound, for the security of the mortgagee, to bring before the Court all parties who might call for redemption; that is to say, second mortgagees and subsequent incumbrancers."⁴

53. So, it is said, all incumbrancers should be made parties to a bill for foreclosure. If those summoned fail to appear, the foreclosure may still take place.⁵ And incumbrancers not parties are not bound by the decree.⁶

54. More especially, a *junior* mortgagee, or his assignee, must be made party to a bill for foreclosure by a senior one, else he is not bound thereby.⁷ In New Hampshire, Gilchrist, J., says: "The doctrine, as to the necessity of notice by the party attempting to foreclose, to all those whose interests

¹ Jones v. Stienbergh, 1 Barb. Ch. 250.

² Railroad, &c. v. Claghorn, Spears, Ch. 545.

³ Bigelow v. Bush, 6 Paige, 343.

⁴ Per Rolfe, V. C., Johnson v. Holdsworth, 1 Eng. Rep. 144. See Wood v. Oakley, 11 Paige, 400; Champlin v. Foster, 7 B. Mon. 104; Weed v. Beebe, 21 Verm. 495; Walker v. Bank, &c.,

6 Ala. 452; Haines v. Beach, 3 Johns. Ch. 459; Ducker v. Bell, 3 Md. Ch. 13; Mulford v. Williams, 4 Halst. Ch. 536.

⁵ Judson v. Emanuel, 1 Ala. (N. S.) 598. See Smith v. Chapman, 4 Conn. 344.

⁶ McCall v. Yard, 1 Stockt. 358.

⁷ Cooper v. Martin, 1 Dana, 25; Swift v. Edson, 5 Conn. 531.

may be affected by the foreclosure, is well settled. All incumbrancers, existing at the commencement of the suit, are entitled to become parties; for they have an interest to be affected, and ought to have an opportunity of paying off the prior incumbrances. The injustice that would be produced if they were to lose their rights because they are not made parties, is very apparent.”¹ (*m*)

55. But, on the other hand, a subsequent mortgagee is held to be a *proper*, but not an *indispensable*, party.² Though not made a party, if there be no collusion between the other parties, nor any other special ground of equity; the decree and sale will still be conclusive.³ The omission will not defeat the action, though the subsequent mortgagee may still retain his right to redeem.⁴ So, although, in case of a foreclosure and sale by a prior mortgagee, it is his duty to make a subsequent incumbrancer a party, if he knows of the subsequent incumbrance; this is only for the purpose of giving the subsequent incumbrancer an opportunity to make any defence which he may have. If he is not made a party, but had notice, or had no defence, there is no ground for a reversal of the judgment.⁵ More especially, though a decree does not bind subsequent incumbrancers who are not parties, yet it is still good, and binding on the parties to the suit, where from the sale, fairly conducted, not enough has been realized to

¹ Downer v. Clement, 11 N. H. 42.

² Cullum v. Batre, 2 Ala. 415; Wilson v. Hayward, 6 Flor. 171; Rowan v. Mercer, 10 Humph. 359; Mack v. Grover, 12 Ind. 254.

³ 10 Humph. 359.

⁴ Valentine v. Havener, 20 Mis. 133.

⁵ Webb v. Mexan, 11 Tex. 678.

(*m*) But in the same case it was held, that under the statute which provides, that if the mortgagee, &c., shall after condition broken enter peaceably, either under or without process, and remain in peaceable and continued possession for one year, without payment or tender, the right to redeem shall be foreclosed; a subsequent mortgagee will be foreclosed by such entry and possession, either with or without legal process, though no notice of it was given to him. Downer v. Clement, 11 N. H. 40; Kittredge v. Bellows, 4 N. H. 424; Gilman v. Hidden, 5 N. H. 30.

pay the first mortgage.¹ And a subsequent incumbrancer, whose right of redemption has been foreclosed, need not be a party.² So, if the mortgagor consent to a sale, the proceedings will not be set aside on his application, except to prevent irremediable harm.³

56. If a second mortgagee is not made party to a suit to foreclose the first mortgage, the purchaser, having actual or implied notice, takes an interest equal to the amount of such mortgage, and the mortgagor's right to redeem, leaving the land subject to the second mortgage.⁴ And the primary fund for payment of the second mortgage, before resorting to the personal liability of the mortgagor, is the surplus of the purchase-money over the amount due on the first mortgage.⁵ The mortgagee of such purchaser will take the land with all his rights and liabilities.⁶ The holder of the second mortgage, in such case, may maintain a bill for foreclosure, without redeeming the first mortgage; and on a sale of the premises, the proceeds will be first applied to payment of the amount due on the first mortgage at the time of the sale under it, with interest, and deducting the net amount of rents and profits; then to the satisfaction of the second mortgage and the complainant's costs; the surplus, if any, to be paid to the purchaser under the suit to foreclose the first mortgage, or his assignee.⁷

57. Where junior mortgagees are made defendants and make default, it is held that the Court can only foreclose such junior mortgagees in favor of the plaintiff; it is error to order payment of such mortgages.⁸ On the other hand, where they are not made parties, it is held that there should be no strict foreclosure, but a sale, and a distribution of the proceeds according to priority of lien.⁹

58. A second mortgagee inquired of the first as to the nature and extent of his claim, and was told by the latter, that

¹ *Montgomery v. Tutt*, 11 Cal. 307.

² *Broome v. Beers*, 6 Conn. 198.

³ *Finley v. Bank, &c.*, 11 Wheat. 304.

⁴ *Vanderkemp v. Shelton*, 11 Paige 28.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Kenton v. Spencer*, 6 Ind. 321.

⁹ *Warner v. Helm*, 1 Gilm. (Va.) 220.

he did not expect to rely upon his mortgage, but, if a small balance should be due him, he would notify the other party or his counsel. Held, he was bound to give special and personal notice, before proceeding to foreclose.¹

59. If a junior mortgagee is made a defendant in a foreclosure suit, it is proper for him to appear and protect his rights. And where A. brought three separate foreclosure suits, his mortgages being upon three houses and lots, and B. had a single junior mortgage covering all of them, and appeared in each suit, and at the references and sales, and there was a surplus; it was held, that he was entitled to have the surplus paid into court, and a reference in each suit, and that he must be paid his taxable costs.²

60. Where a prior mortgagee brought a bill to foreclose, to which a subsequent purchaser from the mortgagor, who had given a mortgage for the purchase-money, was made party: a bill by the plaintiff's mortgagor, as mortgagee in the second mortgage, to foreclose, was held unnecessary; and the solicitor, by whom both were filed, was ordered to elect in which suit he would proceed, and the other was dismissed.³

61. Where, in a suit by a first mortgagee against the mortgagor and second mortgagees, the usual decree has been made for successive foreclosures, before the plaintiff can obtain an order for foreclosing the mortgagor, he must obtain an order for absolutely foreclosing the second mortgagee.⁴

62. The owner of land, bound by a judicial mortgage, having taken advantage of the bankrupt act, one of his creditors, holding a prior mortgage, filed a bill in the U. S. District Court, to correct a description of the land in his deed, giving notice to the assignee of the bankrupt, but not to the subsequent mortgagee, and obtained a decree to reform his mortgage; afterwards, on the application of the plaintiff, of which notice was given to the second mortgagee, the Court

¹ Hall v. Cushman, 14 N. H. 171.

² Smack v. Duncan, 4 Sandf. Ch. 621.

³ Wendell v. Wendell, 3 Paige, 509.

⁴ Whitbred v. Lyall, 39 Eng. Law & Eq. 174.

ordered that all other mortgages on the land be cancelled, and the land sold, at which sale the plaintiff purchased it. Held, he was entitled to the property as against the second mortgagee.¹

63. Where subsequent mortgagees are parties to a bill, and, after decree for a sale, the sale is stopped, on payment of interest and costs ; such mortgagees cannot avail themselves of the decree, except by supplemental bill.²

64. In suits to foreclose, brought by *subsequent mortgagees*, the question has often arisen, whether the prior incumbrancer shall be made a party. (*n*) It has been held in Tennessee and Indiana, that the second mortgagee need not make the first a party to his bill, because his title is not affected by the proceedings.³ In Kentucky, he must be made party, and become such, even after an interlocutory decree for payment at a future day.⁴ In New York, the Court remark : — “ It is a general rule, that, besides the parties to the mortgage, those only are proper parties to a suit for its foreclosure who have, subsequent to the mortgage, acquired rights or interests under the mortgagor or mortgagee. The plaintiff *may* also make prior incumbrancers parties to the bill, for the purpose of having the amount of such incumbrances liquidated and paid out of the proceeds of the sale ; or he may, at his option, have the premises sold subject to such prior incum-

¹ Fowler v. Hart, 13 How. 373.

Wright v. Bundy, 11 Ind. 398. See

² Rankin v. Reformed, &c., 1 Edw. 20.

Western, &c. v. Potter, 1 Clark, 432 ;
Caldwell v. Taggart, 4 Pet. 190.

³ Mims v. Mims, 1 Humph. 425 ;

⁴ Clark v. Prentice, 3 Dana, 468.

(*n*) See Ford v. Rackham, 23 Eng. Law & Eq. 622. Somewhat analogous to a prior mortgage, is the incumbrance of an *easement* existing at the time a mortgage is given. Thus A. mortgaged land to B, after granting an easement thereon to C., and B. foreclosed. Held, the mortgage passed the title, subject to the easement, and the sale on foreclosure did not extinguish the easement, the grantee not being a party to the decree. Combs v. Stewart, 10 B. Mon. 463. So, where legacies constitute a prior incumbrance on land mortgaged, the legatees must be made parties to a bill for foreclosure and sale. Otherwise, it seems, in case of technical foreclosure. M'Gown v. Yerks, 6 Johns. Ch. 450.

brances. The object of the bill is to vest in the purchaser under the sale made by virtue of the decree of foreclosure, the same title which the mortgagor had at the time of the execution of the mortgage."¹ So, in Maryland, if the prior mortgage is due, it is held, after some conflicting decisions, that the prior mortgagee is a necessary party.² In Wisconsin, he is held to be a *proper* party.³

65. Where a bill to foreclose a second mortgage does not make the first mortgagee a party, a sale under such bill will not pass an absolute title; and the purchaser may set aside the sale, on the ground of mistake as to the title.⁴

66. Where the first mortgagee is not made party to a suit for foreclosure of a second mortgage, the purchaser will take subject to the first mortgage, and cannot enforce payment of it by the mortgagor, till he has exhausted his remedy against the land.⁵

67. If, after such sale, the mortgagor pays the first mortgage, he will be subrogated to the rights of the first mortgagee against the land.⁶

68. Though a second mortgagee may file a bill of foreclosure against the mortgagor and a third mortgagee, without making the first mortgagee a party, a second mortgagee cannot file a bill to redeem the first mortgage, without making the mortgagor a party.⁷

69. Where a bill was filed to foreclose a mortgage, making other persons than the mortgagor parties, charging that one of them had given a prior mortgage on the same premises, which he had since paid, but caused to be assigned to one of the other defendants for the purpose of keeping it alive against complainant's mortgage; and asking that it be decreed to have been satisfied, — but the bill did not show any privity of title to the land between the parties to

¹ Per Harris, J., *Holcomb v. Holcomb*, 2 Barb. 23.

² *Wylie v. McMakin*, 2 Md. Ch. 413.

³ *Person v. Merriek*, 5 Wis. 231.

⁴ *Shively v. Jones*, 6 B. Mon. 274; *Roll v. Smalley*, 2 Halst. Ch. 461.

⁵ *Vanderkemp v. Shelton*, 11 Paige, 28; *Finley v. Bank, &c.* 11 Wheat. 304.

⁶ *Vanderkemp v. Shelton*, 11 Paige, 28.

⁷ *Rose v. Paige*, 2 Sim. 471; *Richards v. Cooper*, 5 Beav. 304; *Coote*, 576.

the first and the parties to the second mortgage, or what was the state of the title at any time, or any obligation on the part of the first mortgagor which would entitle the second mortgagor, or his assigns, to require him to pay or remove such first mortgage; held, the bill showed no title to relief as against the parties to such first mortgage.¹

70. A mortgagee may make prior incumbrancers parties to a suit for foreclosure, and have a decree for a sale of the land free from all incumbrances.² He may pray for a sale subject to the prior mortgage; or that he may be allowed to redeem, and have the premises sold, to pay the redemption money and his own mortgage; or that they may be sold, the prior mortgagee consenting, and the incumbrances paid according to priority. Such consent may be shown by the first mortgagee's putting in the prior mortgage, or by his answer.³

71. A second mortgagee filed a bill against the mortgagor and subsequent mortgagees, not making the first mortgagee a party. It was contended by a fourth mortgagee, a defendant, that he should have been made a party, in order that he (the fourth mortgagee) might redeem all the mortgages, without exposure to another suit. But the objection was overruled.⁴

72. A bill to foreclose a mortgage showed that there was a prior incumbrancer, who was not made a party. The answer denied it, and alleged that he had been paid. The defendant also demurred, for want of proper parties. Held; that, as the answer showed that the debt of the prior incumbrancer had been paid, there was no necessity of making him a party, notwithstanding the allegation in the bill, but that a general demurrer, without answer, would have been sustained.⁵

73. In a suit to foreclose, subject to a prior mortgage, the holder of which was not made party, a receiver of the rents was appointed, and afterwards appointed receiver in a sub-

¹ *Wright v. Dudley*, 8 Mich. 115.

Ch. 531; acc. *Persons v. Alsip*, 2 Cart. 67.

² *Vanderkemp v. Shelton*, 11 Paige, 28.

³ *Richards v. Cooper*, 5 Beav. 304.

⁴ *The Gihon v. Belleville, &c.* 3 Halst.

⁵ *Gayle v. Toulmin*, 5 Ala. 283.

sequent suit by the prior mortgagee to foreclose. Held, such prior mortgagee was entitled only to so much of the rent in the possession of the receiver, as had come to his hands subsequently to his appointment in the second suit, although the proceeds of the mortgaged premises were insufficient to satisfy the prior mortgage.¹

74. A subsequent mortgagee may maintain a bill to redeem a prior mortgage, although he has previously foreclosed the equity of redemption, without making the first mortgagee party to the former suit.²

75. Bill by a subsequent mortgagee against the mortgagor and prior mortgagees, neither admitting nor denying the prior mortgages, but praying that the mortgagor be decreed to pay the plaintiff's mortgage, or else all the defendants barred and foreclosed, the premises sold, and the plaintiff paid from the proceeds, and for further relief. Held, a demurrer by a prior mortgagee should be allowed.³

76. Redemption will be decreed according to the priorities of the claimants; that is, if there are several mortgagees, the Court will decree in detail, that the second shall redeem the first, the third the second, and so on.⁴

77. Incumbrancers and assignees of the equity of redemption, subsequent to the filing of the bill, are affected by notice, having taken *pendente litè*.⁵

78. Where a second mortgagee brought a bill to redeem the first mortgage, and the Court postponed the second mortgage on account of misrepresentations made by the plaintiff, thereby letting in and giving priority to a subsequent mortgage to the defendant of a part of the land; held, the plaintiff could not proceed under the bill for the redemption of the subsequent mortgage, nor could the bill be amended for that purpose.⁶ The Court say:⁷—"We have considered the position, that this case was in a court of equity, and that the postponement of the plaintiff's second mortgage was merely

¹ Howell v. Ripley, 10 Paige, 43.

² Farwell v. Murphy, 2 Wis. 533.

³ The Gilon v. Belleville, &c. 3 Halst. Ch. 531.

⁴ Archdeacon v. Bowes, McClel. 153.

⁵ Coote, 579.

⁶ Platt v. Squire, 5 Cush. 551.

⁷ Ib. 556, 557.

because equity required it; and hence it was argued, the Court would see that no injustice is done to the plaintiff by such postponement, beyond giving the defendant adequate security for the money due on his second mortgage. But the same rule of postponing would have been held at law. Estoppels *in pais* are effectual in courts of law as well as in courts of equity. The finding of the jury has placed the defendant's second mortgage as the prior mortgage, and all the consequences incident to it must follow." As to the motion to amend, the Court say: — "This motion comes at a very late stage of the proceedings in this case. The plaintiff forbore to tender anything on the second mortgage; forbore to offer in his bill to redeem it; and forbore to ask an amendment upon the coming in of the defendant's answer, setting up this mortgage and his entry for foreclosure; relying rather upon his legal rights to defeat it wholly. The effect of an amendment, so far as respects the second mortgage of the defendant, would be to make a new bill. It would be an offer to redeem, first made some three or four years after the foreclosure had been perfected, if it is so at all. If not, then the plaintiff may file a bill offering to redeem it, which is all we could grant by the proposed amendment."

79. The purchaser of a mortgage term of 200 years, created out of and determinable with the estate of a tenant for life, filed a bill to redeem a prior mortgage term of 1000 years, limited by the tenant for life under a power. Held, the tenant for life was a necessary party to the bill, though having a mere nominal interest.¹

80. By a practice recently adopted in England, mortgages may be foreclosed by means of *a claim*, so called. (*o*) Some questions have arisen as to the proper parties in this mode of proceeding, where there are successive mortgages. In *Smeathman v. Bray*,² the Vice-Chancellor said: — "As this

¹ *Hunter v. Macklew*, 5 Hare, 238. *v. Turner*, 7 Eng. Rep. 138; *Caton v.*

² 8 Eng. Law & Eq. 46; *Robinson Reeves*, 15 Eng. Law & Eq. 334.

(*o*) See *Jacobs v. Richards*, 23 Eng. Law & Eq. 436.

was a *claim*, and that form of proceeding did not give the plaintiff any discovery from the mortgagor as to the existence or non-existence of subsequent incumbrances, which might create a defect in the title to be acquired under the decree, he should in this case, and in all cases of foreclosure by claim, give the plaintiff the option either of taking an inquiry before the Master as to other incumbrances, suspending the final decree until the report, or of taking the common decree of foreclosure in the first instance."

81. Upon a claim by an equitable mortgagee against the mortgagor, asking for a sale, and that the several other mortgagees might be summoned before the Master, or that a decree might be made to ascertain the mortgages and their priorities, the Court refused the order. Romilly, M. R., says: "The relief asked is direct against all the mortgagees. Were I to make the decree, it might affect several absent parties. I think, therefore, that I cannot, in the presence of one defendant alone, make any such order. The claim may be amended."¹

82. With respect to the proper parties in case of *remainder*, it has been held, that, if the equity of redemption is limited to uses, the remainder-man may file his bill to redeem, but he must give the first tenant for life and intermediate remainder-men an option of redeeming according to their priorities.² In New York, the only necessary parties are the person holding the first vested estate of inheritance, and those holding prior interests; and the decree will bind remainder-men.³

83. As to the necessary parties to a suit *after the death of mortgagee or mortgagor*; the rule varies accordingly as one or the other has deceased, and also as the suit is brought by or against the representative of the deceased party. (*p*)

¹ Burgess v. Sturgis, 8 Eng. Law & Eq. 270, 271.

³ Eagle, &c. v. Cammet, 2 Edw. Ch. 127.

² Ralley v. King, 1 Keen, 618.

(*p*) See Bruiton v. Birch, 19 Eng. Law & Eq. 583; Long v. Storie, 23 Ib.

84. It has been seen (ch. 11) that a mortgage before foreclosure is considered personal property, and goes to the personal representative of the mortgagee. Hence in a bill to foreclose, more especially before possession taken, the heir need not generally be made a party;¹ nor can he maintain such bill.² In a bill to redeem, the personal representative of the mortgagee is a necessary party.³ So, where a mortgagee, or one for the security of whose debts or responsibilities a deed of trust is given, dies, his personal representative is an indispensable party to a bill for the foreclosure of the mortgage, or the execution of the trust.⁴ So the personal representatives of a deceased executor are necessary parties to a suit in equity, brought by an administrator with the will annexed, to foreclose a mortgage given to the deceased as "acting executor," &c.⁵ But, by the English law, it is said, the heirs of a mortgagee must be made parties to a suit in equity, in order that they may reconvey the land, in case of redemption. The rule is sometimes dispensed with, where the heirs are out of the jurisdiction.⁶ So it has been held in the Circuit Court of the United States, that the heirs

¹ *Kinna v. Smith*, 2 Green, Ch. 14;

Dexter v. Arnold, 1 Sumn. 109. See

Herrick v. Mann, 2 Halst. Ch. 460.

² *Roath v. Smith*, 5 Conn. 133.

³ *Guthrie v. Sorrell*, 6 Ired. Eq. 13.

⁴ *Vanhorn v. Duckworth*, 7 Ired. Eq.

261.

⁵ *Peck v. Mallams*, 10 N. Y. (6 Seld.)

509.

⁶ *Dexter v. Arnold*, 1 Sumn. 113.

See *Felch v. Hooper*, 2 Appl. 159.

351; *Brevoort v. Jackson*, 1 Edw. Ch. 447; *Harrison v. Menzies*, 2 Edw. Ch. 251; *Roger v. Meakly*, 2 Port. 516; *Walker v. Bank, &c.*, 6 Ala. 452.

The judgment against a mortgagee, in proceedings to foreclose a mortgage, which were instituted after the death of the mortgagee, is void. *Bollinger v. Chouteau*, 20 Mis. 89.

A mortgagee having died, upon petition for foreclosure by an heir, it appeared that the heirs divided the property, agreeing that the mortgage and accompanying note should belong to the petitioner, which were accordingly assigned and delivered to her. There was property to the amount of \$40,000, and only a single debt, of \$100. No proceedings were had in the probate court, and the creditor did not in any way interfere. Held, the petitioner, upon furnishing indemnity, was entitled to a decree of foreclosure. *Babbitt v. Bowen*, 32 Verm. 437.

as well as executors of the mortgagee shall be parties to a suit for redemption; subject to some exceptions.¹ So in Indiana and New Jersey, in a bill for foreclosure. So in Alabama, where an account is sought, they may be joined.² So in Tennessee, the heirs are necessary parties.³

85. It is said,⁴ the mortgagor or his heir, or devisee, (*q*) must always be a party defendant; while, on the other hand, the executor, &c., is not a necessary party.⁵ (*r*) In many of the States, however, either by virtue of express statutory provision, or upon general grounds, the personal representative of the mortgagor is required to be made a party. Thus in New York, the executor may be joined in the bill, for the purpose of holding him liable in case of deficiency. But no

¹ 1 Sumn. 109.

² *Slaughter v. Foust*, 4 Blackf. 379; *Erwin v. Ferguson*, 5 Ala. 158; *Osborne v. Tunis*, 1 Dutch. 633. See *Wallace's, &c. v. Holmes*, 40 Penn. 427; *M'Iver v. Cherry*, 8 Humph. 713; *Wallace v. Blair*, 1 Grant, 75; *Graham*

v. Carter, 2 Hen. & M. 6; *May v. Rawson*, 21 Geo. 461.

³ *M'Iver v. Cherry*, 8 Humph. 713.

⁴ *Coote*, 577; *Lane v. Erskine*, 13 Ill. 501; *Harrison v. Menzies*, 2 Edw. Ch. 251; *Harvey v. Thornton*, 14 Ill. 217.

⁵ *Averett v. Ward*, 1 Busb. Eq. 192.

(*q*) The personal representative of a mortgagor must be made party to a bill for the execution of a trust for sale by way of mortgage. *Christophers v. Sparke*, 2 Jac. & W. 229. Where executors have mortgaged for payment of debts, they are not necessary or proper parties to a redemption suit, unless the equity of redemption is limited to them. *Greenwood v. Rothwell*, 7 Beav. 280. If the mortgagor die after entry of a decree of sale against him, the decree may be enrolled, without a revivor. *Harrison v. Simons*, 3 Edw. Ch. 394.

Successive purchasers under a devisee of the mortgagor should be made parties. So the devisee himself, and other devisees of the equity of redemption. *Mayo v. Tomkies*, 6 Munf. 520.

Where the equity of a mortgagor deceased, insolvent, has been sold, the mortgagee may foreclose without waiting the appointment of an administrator. *May v. Rawson*, 21 Geo. 461.

(*r*) In a bill to foreclose a mortgage, the mortgagor being dead, the allegation that he left certain children surviving him is equivalent to an allegation that they are his heirs. *Erwin v. Ferguson*, 5 Ala. 158. A decree of foreclosure against the administrator of an insolvent estate is no bar to the heirs' redeeming. *Sheldon v. Bird*, 2 Root, 509.

decree is rendered or execution issued till an account is taken of the estate, unless he admit assets for all debts of an equal or higher class. If the executor be unnecessarily joined, no costs shall be taxed on this account.¹ So, in California, where the bill prays for payment of a deficiency in the mortgage debt, the administrator must be made party.² So, in Missouri, the executor, &c., of the mortgagor is to be made party.³ And under the statute of 1845 the administrator, not the heir, is to be made party to a suit for foreclosure.⁴ So in Missouri, in the case of a deceased mortgagor, under the statute, his personal representative only need be made party to a *scire facias* to revive a judgment for foreclosure. The heirs need not be joined.⁵ So in Georgia, the executor, &c., is held the proper party.⁶ And the administrator of a mortgagee may foreclose at law against the administrator of the mortgagor, and need not make the heirs of the mortgagor parties.⁷ So in Illinois, the heirs of a deceased mortgagor need not be made parties to a *scire facias* to foreclose a mortgage; the statute authorizes the proceeding by making either the heirs, executors, or administrators parties.⁸ In Alabama, although the executor, &c., is held not a necessary party;⁹ yet the reason is given for joining the executor, that it would be his duty to prevent a recovery for a larger sum than was due upon the mortgage, inasmuch as the assets in his hands would be liable to pay so much as might be unsatisfied by a sale of the mortgaged property.¹⁰ (In the same State, where the heirs of a mortgagee are not made parties to a foreclosure suit; a decree will not be reversed for this cause, the record not showing them to be material parties.¹¹) In Michigan, the executor, &c., is not a proper party, unless the security is insufficient, and the personal estate sought to be charged.¹² In Ohio, under the law authorizing proceedings by *scire*

¹ Leonard v. Morris, 9 Paige, 90.
See Mayo v. Tomkies, 6 Munf. 285.

² Belloc v. Rogers, 9 Cal. 123.

³ Miles v. Smith, 22 Mis. 502.

⁴ Perkins v. Wood, 27 Mis. 547.

⁵ Riley v. M'Cord, 21 Mis. 285.

⁶ Magruder v. Offutt, Dudl. 227.

⁷ Dixon v. Cuyler, 27 Geo. 248.

⁸ Rockwell v. Jones, 21 Ill. 279.

⁹ Inge v. Boardman, 2 Ala. 331.

¹⁰ Wilkins v. Wilkins, 4 Port. 250.

¹¹ Ibid. 245.

¹² Abbott v. Godfrey, 1 Mann. 178.

facias on a mortgage to enforce payment of the mortgage debt against the lands of a deceased mortgagor, a judgment against the personal representative is binding upon the heirs.¹

86. The heirs of a subsequent mortgagee are not necessary parties to a bill to foreclose a prior mortgage. His rights are represented by the executor.²

87. The complainant in a foreclosure suit cannot make the heirs or devisees of a deceased mortgagor or guarantor, who have no interest in the property, parties to the bill, in order to obtain a decree over for the deficiency, against the real estate of the mortgagor.³

88. In New York, under the Revised Statutes, the heirs of a mortgagor are the proper parties to prosecute a suit to redeem.⁴

89. In Tennessee, if the mortgagee die pending the suit, the heir or assignee of the heir may have a bill of *revivor*, without joining the personal representative.⁵

90. Where a mortgagor dies before final decree in a suit for foreclosure, and his will is duly approved; still his heirs, as well as the executor and devisees must be made parties to a bill of revivor; inasmuch as the probate may be impeached by a bill in chancery.⁶

91. The effect of a decree of foreclosure under a mortgage is not so extensive as that of a decree in a proceeding *in rem*; it does not prejudice the rights of those who ought to be, but are not made, parties. If the mortgagor dies before the rendition of the decree, and the suit is thereupon revived against his administrator and sole devisee, and not against his heirs, the decree of foreclosure, and the complainant's purchase of the premises at the master's sale, are both made void, as against the heirs of the mortgagor, if they set aside the probate of their ancestor's will, by bill in chancery within the time allowed by statute.⁷

¹ *Biggerstaff v. Loveland*, 8 Ham. 44.

² *Shaw v. M'Nish*, 1 Barb. Ch. 326.

³ *Leonard v. Morris*, 9 Paige, 90.

⁴ *Wolcott v. Sullivan*, 6 Paige, 117.

⁵ *Atchison v. Surguine*, 1 Yerg. 400.

⁶ *Hunt v. Acre*, 28 Ala. 580.

⁷ *Ibid.*

92. If the personal representative of a mortgagor, though a necessary party defendant, appears without a formal order and obtains time to answer, he is estopped, in error, from objecting to the want of proceedings to make him a party.¹

93. Where the executrix of the mortgagor, who has not qualified as such, is made a party, the objection is personal to herself, and can be raised only by demurrer.²

94. Where a bill was filed against the heirs of a mortgagor, and the purchasers under a decree for the sale of the mortgaged premises, to disembarass the title, and reach the proceeds, and no decree could pass against some of the heirs, because the mortgage had not been so introduced into the cause as to be evidence against them, nor against others, who were minors, for the want of other evidence than their guardian's answers, nor against the purchasers, because a title could not be given to them; the bill was dismissed without prejudice, that the complainants might institute new proceedings, to bring the merits of their case before the Court, and call upon the purchasers to elect whether they would have the sale rescinded.³

95. By the laws of Texas, the representative of a deceased co-mortgagor is not to be made a party, in a proceeding to foreclose in the district court. The probate court has jurisdiction of the interest of the deceased; and a decree in the district court, in such cases, should be for the sale of the living mortgagor's interest alone.⁴

96. H. sued K. and L. to foreclose a mortgage made by them; before the suit, L. conveyed to M., who reconveyed to L., but did not record the reconveyance; H. made M. a party and discontinued as to L., who died; and a decree passed against K. by default. Held, that the foreclosure was good as to him without bringing in the representatives of L.; that though K. might, by moving before the decree, have had the representatives of L. brought in, yet having acquiesced in the discontinuance as to L., and the reconveyance to L.

¹ *Wilkins v. Wilkins*, 4 Port. 245.

² *Erwin v. Ferguson*, 5 Ala. 158.

³ *Stewart v. Duvall*, 7 Gill & J. 179.

⁴ *Martin v. Harrison*, 2 Tex. 456.

not being on record or known to the complainant, the objection could not be made by K. after the decree. So also K. could not after decree object to a defect in the notice to bring in a co-defendant, as the decree was good against K., though the co-defendant was not brought in.¹

97. To a bill for foreclosure, *the widow* of the mortgagor need not be made a party defendant. She could not be a party plaintiff in relation to the real estate of the husband, before assignment of dower, having no recognized interest therein; and therefore need not be made defendant at law or in equity.²

98. A., in 1826, gave a mortgage upon his real estate, in which his wife did not join. He had previously contracted to sell to B., the defendant, and others, various parcels of the land, and the contracts were included in the mortgage, and assigned to the mortgagee, with the moneys due and to grow due thereon. A. died in 1830, leaving a will, in which he made a provision for his wife, the plaintiff, not expressed to be in lieu of dower, and appointed her executrix, and several others executors. After the testator's death, the assignee of the mortgage, and several of the persons holding contracts of purchase, one of whom was the defendant in this suit, united and filed a bill in chancery against the widow and the devisees under the will, one of whom was the executor that had qualified; and served on the defendants in that suit a notice, stating that the object of the suit was to foreclose the mortgage, and that they made no personal claim against the defendants; and in the bill filed by them they set forth the rights of the defendants under the will, and that the widow and one of the defendants had qualified as executrix and executor, and then set forth generally, that the defendants had, or claimed to have, some interest in the premises as subsequent purchasers, incumbrancers, or otherwise; but made no mention of the widow's claiming dower, or any allegation in reference thereto. The defendants suffered the bill to be taken as confessed, and a decree of sale was made,

¹ Houghton v. Mariner, 7 Wis. 244.

² Mims v. Mims, 1 Humph. 425.

and that the purchaser be let into possession ; and, upon a sale being made under the decree, the assignee of the mortgage became the purchaser, and received a Master's deed. In an action of ejectment by the widow for dower, held, the title acquired by the purchaser was subject to dower ; that her claim was paramount to the mortgage, and that the decree and Master's deed was no bar to it ; that the bill was not properly framed to enable her to litigate her claim to dower in that suit ; that, as there was no allegation in the bill relative to her claiming dower, or that the devise under the will was in lieu of her dower, she was not a party to that suit as dowress, but only as executrix and devisee, and her claim to dower, being paramount to the mortgage, was not the subject of litigation in that suit ; and that as to that claim she would not have been a proper party to the suit.¹

99. A., after his marriage, mortgaged certain real estate, and died, leaving a will, by which the income of all his real and personal estate was given to his wife for life, with remainder over. The mortgagee brought a suit for foreclosure, and made the widow a party, alleging that she had, or claimed to have, rights in the estate, as a purchaser or incumbrancer, subject to the mortgage. The suit went by default against the widow. Held, that the gift to her by will was not a provision in lieu of dower ; but that she was entitled to her dower, and the provision in the will also ; and that the judgment in the foreclosure suit did not bar her rights of dower, as they had not been in question in that suit.²

100. The *legatees* of a bond and mortgage, under a will executed in one State, may maintain a bill for foreclosure in another State, where the land lies.³

101. Legatees, whose legacies are charged by the will of the mortgagor upon the equity of redemption, are necessary parties to a redemption suit, instituted by the mortgagor's

¹ *Lewis v. Smith*, 11 Barb. 152.

² *Ibid.* 5 Seld. (N. Y.) 503.

³ *Smith v. Webb*, 1 Barb. 230.

devisee, in which the mortgagee claims an absolute title by virtue of the statute of limitations.¹

102. Where a mortgage is made to the special *guardian of an infant*, and for the benefit of the latter, a bill for redemption and assignment of a prior mortgage should be brought by the guardian.²

103. A bill to redeem a mortgage, made to an infant who has a guardian, should join them as defendants. If it does not, the Court will appoint a guardian *ad litem*.³

104. It is held that the guardian of an infant is not a proper party to a suit for foreclosure of a mortgage made by the latter.⁴ (s)

105. It is sometimes held that the wife of the mortgagor or of his grantee is an indispensable party to a suit for foreclosure.⁵ So, in a foreclosure suit, involving a right of homestead, the wife must be allowed to intervene.⁶ So, upon a mortgage by both, to secure the husband's note, a bill to foreclose, praying judgment against the husband on the note, and a decree of sale against both, is proper.⁷

106. But on the other hand, it is held that the wife is not a necessary party, though she joined in the mortgage.⁸ So it is held, that the wife of a mortgagor becomes a material party to a foreclosure suit, on account of her right of dower, only from the time she is ordered to answer separately. But if she so answer, and her answer be received, she will stand on the footing of a separate defendant.⁹ (t)

¹ Batchelor v. Middleton, 6 Hare, 75.

² Pardee v. Van Arken, 3 Barb. 534.

³ Parker v. Lincoln, 12 Mass. 16.

⁴ Alexander v. Frang, 9 Ind. 481.

⁵ Mills v. Van Voorhis, 23 Barb. 125.

⁶ Sargent v. Wilson, 5 Cal. 504.

⁷ Rollins v. Forbes, 10 Cal. 299.

⁸ Thornton v. Pigg, 24 Mis. 249; Powell v. Ross, 4 Cal. 197.

⁹ Dennitson v. Potts, 11 S. & M. 35.

(s) As to foreclosure in case of *insanity* of the mortgagor, see Lockwood v. Mitchell, 7 Ohio, N. S. 387.

(t) On a claim for foreclosure, service of the writ of summons on the wife of a party interested in the equity of redemption, who was travelling in America, was ordered to be deemed good service on the husband, under the

107. Where a part of mortgaged premises is claimed by a wife as her separate estate, the Court, notwithstanding a regular default in a foreclosure suit, will make such an order as to protect her right.¹

108. Where property was held by a married woman to her separate use, and mortgaged by her and her husband; and she brought a bill to redeem, alleging a contingent interest in him as tenant by the curtesy, and also an assignment by him as an insolvent debtor; it was held that the husband was not a necessary party to the bill.² On the other hand, a mortgage was given by husband and wife of her estate. They remained in possession till breach of condition, and the mortgagee brings an action to foreclose against both. Held, the wife was rightly joined as defendant. By joining in the mortgage, she parted with her estate *pro tanto*, but no further. The equity of redemption was still hers, and could not be disposed of by the husband without her consent. It seems an entry *in pais*, with his assent, but unknown to her, would not foreclose her right to redeem. Hence in a suit for that purpose she must be joined: In case of his death, the action might proceed against her. She would be entitled to the benefit of the conditional judgment, might pay the debt, and thus prevent a foreclosure. The object of the statutory action is, to give the mortgagee such possession as will result in an absolute title, unless redeemed. It would be inconsistent with the plain principles of law and justice, to hold that she and her estate should be bound by the judgment, if she could not be a party to the suit.³ So the interest of the wife of a purchaser of real estate, who gives

¹ *Bard v. Fort*, 3 Barb. Ch. 632.

³ *Swan v. Wiswall*, 15 Pick 126.

² *Conant v. Warren*, 6 Gray, 562.

Stat. 4 & 5 Will. 4, c. 83, the wife being in the possession and receipt of the rents and profits. *Carwardine v. Wislade*, 6 Eng. Law and Eq. 103.

In a bill by a wife, in Louisiana, to be relieved from a mortgage made by her, on the ground of her disability to contract, her husband may properly be joined with her as *prochein ami*. *Bein v. Heath*, 6 How. U. S. 228.

a mortgage to secure the purchase-money, cannot be barred by a suit for foreclosure or a sale on such suit, unless she was a party to it; and, if not joined as such party, she is entitled to her dower out of the surplus remaining after payment of the mortgage debt.¹

109. Where a mortgage is executed by one as *agent* for another, a *scire facias* on it should be issued against the principal and not the agent; and where a purchaser, under such a proceeding against the agent alone, brings ejectment, an exemplification of the proceeding, without evidence of authority to the agent to execute the mortgage, is not competent evidence in favor of the plaintiff.² But an agent, who loaned the money of his principal, and took a mortgage in his own name, without informing the mortgagor of his agency, was held to be a proper, though not a necessary, party to a suit to redeem, though at the time of filing the bill the plaintiff had notice of the agency.³ (*u*)

110. In a bill for foreclosure, one claiming adversely to the mortgagor, and by title prior to the mortgage, cannot be made a party defendant, for the purpose of trying his title.⁴ So one entering upon the premises pending the suit cannot be ejected under the decree, if he did not enter under a party to the suit, or some one claiming under such party.⁵ So an adverse claimant cannot be joined in a bill to foreclose.⁶ So, in a proceeding to foreclose a mortgage under a statute, a third party cannot interfere to prevent the rule absolute. Adverse claimants may interpose their claim when the mortgage execution is sought to be enforced.⁷

¹ Mills v. Van Voorhis, 23 Barb. 125.

² Maus v. Wilson, 15 Penn. 148.

³ Wolcott v. Sullivan, 6 Paige, 117.

⁴ Holcomb v. Holcomb, 2 Barb. 20; Eagle, & Co. v. Lent, 6 Paige, 635; Lyman v. Little, 15 Penn. 576; Jones v.

St. John, 4 Sandf. Ch. 208; Corning v. Smith, 2 Seld. 82; Bogey v. Shute, 4 Jones Eq. 174.

⁵ Van Hook v. Throckmorton, 8 Paige, 33.

⁶ Chamberlain v. Lyell, 3 Mich. 448.

⁷ Jackson v. Stanford, 19 Geo. 14.

(*u*) As to parties in case of *insolvency*: see Collins v. Shirley, 1 R. & My. 638; Singleton v. Cox, 4 Hare, 326; Kerrick v. Saffery, 7 Sim. 317. Where a mortgagor upon his marriage settled the land on his wife and issue,

111. The bar against all parties defendants, mentioned in the Revised Statutes of New York, (2 Rev. Stats. 192, sec. 158,) refers only to the proper parties to a foreclosure suit, namely, mortgagors and mortgagees, and subsequent incumbrancers, and to such rights as have been properly the subject of litigation in the foreclosure suit. It does not embrace paramount rights of parties which have not been subjected to litigation, by the form or substance of the pleadings in the case.¹

112. A. and B., copartners, being indebted to C. and D., copartners, assigned to C. a mortgage, it being understood that the assignors were not to be answerable for the title of the mortgagor. C. died, and D. afterwards became bankrupt, and his assignees filed their bill, alleging the death of B., that A. was insolvent, and praying that the executors and devisees of B. might be decreed to pay, and for general relief, on the ground that the mortgagor had no title to the mortgaged premises, and that he was a bankrupt, which was known to the assignors, and concealed at the time of the assignment. A. demurred, on the ground that the bill did not show title in the complainants under C. to the mortgage. Held, the complainants claiming, not under, but in opposition to, the assignment to C., their title in equity to the debt was unquestionable, nor was it any objection to the bill, that the representatives of C. were not made parties, or that no offer to re-assign the mortgage was made in the bill.²

113. It has been held, that, where the plaintiff in a suit upon mortgage is out of court, a decree may be rendered against one defendant on the application of another.³

114. The question has arisen, how far any controversy

¹ *Lewis v. Smith*, 11 Barb. 152.

³ *Archdeacon v. Bowes*, M'Clel.

² *Pagan v. Sparks*, 2 Wash. Cir. 149.

325.

and became bankrupt; held, his assignee need not be party to a suit for foreclosure. *Steel v. Maunder*, 1 Call, 535.

among the several defendants in a foreclosure suit, as to their respective rights and interests, shall delay or obstruct a decree of foreclosure.

115. In *Renwick v. Macomb*,¹ it was held, that the complainant in a foreclosure suit, although there was no question as to his lien upon the mortgaged premises, and his right to a foreclosure and sale for payment of his debt, could not obtain a decree of sale, until the conflicting claims of the other parties to the suit upon the equity of redemption were adjusted and settled. But it has been also held, that, in a suit to foreclose, defendants, whose claims are upon the equity of redemption merely, cannot litigate their claims to the surplus, as between themselves, until it is ascertained that there will be a surplus, except where their claims are upon different portions of the mortgaged premises.² And in the case of *Farmers', &c. v. Seymour*,³ Chancellor Walworth remarked : — “ The result of such a practice generally was, that the mortgagee was greatly delayed in the collection of his debt, by a useless litigation between the defendants in relation to surplus moneys which might be produced upon a sale of the mortgaged premises, before it was ascertained whether there would be anything raised upon such sale, beyond the amount of the complainant's debt and costs. The 132d and the 136th rules of the Court were intended to change the practice in this particular. Since which time, defendants, whose claims are upon the equity of redemption merely, and who have no interest in the mortgaged premises adverse to the complainant's claim, are not permitted to delay his proceedings by a litigation of their claims to the equity of redemption with their co-defendants, (*The Union, &c. v. Van Rensselaer*, 4 Paige, 85,)” unless absolutely necessary to the protection of their rights.

116. It has since been held, that, where a sale is ordered,

¹ 1 Hopk. 277.

² *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85; acc. *Fry v. Merchants'*, &c., 15 Ala. 819.

³ 9 Paige, 545; acc. *Miller v. Case*,

1 Clark, 395.

and one defendant sets up equities against others, the decree may direct the Master to ascertain and settle such equities.¹

117. Bill of foreclosure filed by the first mortgagee against the mortgagor and subsequent incumbrancers. There was a contest between the defendants as to the priority of their incumbrances, and the order in which they were entitled to redeem the plaintiff, one question being as to the effect of an assignment by a husband of his wife's reversionary interest in leaseholds. The plaintiff had not proved the defendants' securities. The plaintiff claimed the usual decree, for redemption or foreclosure against all the defendants. The several defendants insisted on their respective priorities. Sir John Romilly, M. R., says: "I cannot in this stage of the cause decide a question between co-defendants; yet to exclude any of them, or to postpone their priorities, I must preface the decree with a declaration of their rights. How can I possibly do that without giving them an opportunity of meeting the case made against them? If the plaintiff had raised the question, the defendants might have met it, and as between them, the question might have been determined; but, as between the defendants themselves, no issue could possibly have been raised. The ordinary course in such cases is, to direct the Master to ascertain the incumbrances and their priorities, and when the report is made, the Court may determine any question between the defendants raised by that report; that course must be followed in the present case."²

¹ *N. Y. Life, &c. v. Cutler*, 3 Sandf. Ch. 176.

² *Duberly v. Day*, 7 Eng. R. (1851,) 188.

CHAPTER XXXII.

FORECLOSURE, &C., PLEADING, EVIDENCE, DECREE, &C., IN SUITS
ON MORTGAGES.

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| 1. Pleading; allegations of the plaintiff and the defendant. 34. Set-off. 49. Evidence. 71. Judgment or decree. 74. In case of a debt payable by instalments. 109. For non-payment of interest. 111. Judgment may be rendered for all that is due at the time of rendering it. 121. Judgment in case of parties jointly interested. | 131. Judgment at law may be framed to meet the equities of the case. 136. Amount of judgment, how determined. 141. Time allowed before final judgment. 144. Judgment or decree for a sale; time allowed to prevent such sale; equitable apportionment among different estates, &c. 155. Injunction against waste. 156. Miscellaneous points of form. 160. Costs. |
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1. The general rules of *pleading* apply to suits upon mortgages in law or equity. A few miscellaneous decisions upon this subject are found in the books, depending often, however, upon express statute or local usage, and therefore not of general authority or importance.

2. It has been held, that, in a writ of entry to foreclose a mortgage, the declaration must count upon the mortgage, and indicate a purpose to foreclose, rather than to get possession in order to take the profits.¹ (a)

3. An allegation, that the mortgagor was or pretended to be seised in fee-simple when he executed the mortgage, is a sufficient averment that he was in possession.²

4. A bill for foreclosure need not aver title in the mortgagor.³

¹ Fiedler v. Carpenter, 2 W. & M. 211.

² Holman v. Bank, &c., 12 Ala. 369.

³ Shed v. Garfield, 5 Verm. 39.

(a) *Non-tenure* is held a bad plea to such declaration, whether made by the mortgagor or any other defendant. Fiedler v. Carpenter, 2 W. & M. 211. See chap. 30.

5. A bill for foreclosure and sale must describe the land so particularly, that the officer selling may know it by the description.¹ So it is held that there cannot be a decree for foreclosure and sale without an exhibit of the deed, in order to identify the land.² And the complaint should also allege *registration* of the mortgage.³

6. Where, in a suit to foreclose, copies of the *subpœna* and notice were served upon a subsequent purchaser of a part of the mortgaged premises, but the name of the purchaser was not contained in either; held, as against him all the proceedings subsequent to the filing of the bill were irregular.⁴

7. In Indiana, a bill to foreclose need not set out the mortgage in *hæc verba*. A general statement of points to be proved is sufficient.⁵ In Illinois, in a *scire facias* for foreclosure, it is sufficient to set out a copy of the mortgage, with the certificates of acknowledgment and of record annexed, without averring that the mortgage was acknowledged or recorded, or a default of payment, if the mortgage shows it was due before the writ issued.⁶ In Massachusetts, it has been held that the declaration need not set forth the mortgage. By a late statute, it must allege a seisin *in mortgage*.⁷

8. It has been held in Illinois, that, where a mortgage debt is payable by instalments, a *scire facias* must aver that the last is due.⁸

9. A bill for foreclosure need not allege, nor, if alleged, prove, an indebtedness for which the mortgage was given.⁹ If a particular mode of paying the consideration is stated, the mortgagee may still rely upon the evidence of such payment arising from the mortgage itself.¹⁰

10. A mortgage note need not be made part of the bill, if

¹ Whittelsey v. Beall, 5 Blackf. 143; 10 Ind. 261.

² Triplett v. Sayre, 3 Dana, 590.

³ Magee v. Sanderson, 10 Ind. 261.

⁴ L'Amoureux v. Vandenburgh, 7 Paige, 316.

⁵ Cecil v. Dynes, 2 Cart. 266.

⁶ Mitcheltree v. Stewart, 2 Scam. 18; Emeric v. Toms, 6 Cal. 155.

⁷ Stat. 1852, 883. See Gen. Stat.

⁸ Day v. Cushman, 1 Scam. 475.

⁹ Day v. Perkins, 2 Sandf. Ch. 359.

¹⁰ Russell v. Kinney, 1 Sandf. Ch. 34.

produced subject to cancellation.¹ So the bill need not allege how the plaintiff became owner of the note.² But where the bill described the debt only by reference to the mortgage, and did not make the notes exhibits; held, they ought not to be used at the hearing without proof.³

11. Where a note was given by the mortgagor with others, it is sufficient to allege in the bill for foreclosure, that the mortgagor had failed to pay, and the estate thereby become absolute.⁴

12. A bill to foreclose, where the property is in the hands of a purchaser from the mortgagor, need not allege notice of the mortgage. If such allegation were required, it is sufficient to aver "a pretended purchase."⁵

13. A statute requires, in Indiana, that a bill for foreclosure shall state, whether any and what proceedings have been had at law for recovery of the debt. The omission of such statement is fatal to the bill. If there have been no proceedings, the bill should so allege; if otherwise, it should state what they were.⁶ In New York, if the bill alleges that there have been no such proceedings, and the defendant pleads and proves a judgment for part of the debt; the bill will be dismissed, with liberty to amend, if the remedy at law has been exhausted.⁷

14. A bill to foreclose must offer to pay superior incumbrancers, although it assumes that the complainant's title is paramount.⁸

15. A surety, who has taken a mortgage for his indemnity, is not entitled to foreclose until he has paid the debt.⁹ Therefore, where the plaintiff in a bill to foreclose a mortgage, given to indemnify him against a note for \$800, indorsed by him, and against three other notes subsequently indorsed, amounting to \$800, averred that "he had been

¹ *Knetzer v. Bradstreet*, 1 Greene, 382; *Fenno v. Sayre*, 3 Ala. 458.

² *Fenno v. Sayre*, 3 Ala. 458.

³ *Harlan v. Murvell*, 3 Dana, 180.

⁴ *Hollinger v. Bank*, &c. 8 Ala. 605.

⁵ *Stacy v. Barker*, 1 Sm. & M. 112.

⁶ *McMullen v. Furnoss*, 1 Smith, 73.

⁷ *Lovett v. The German*, &c. 12 Barb. 67.

⁸ *Fenno v. Sayre*, 3 Ala. 458.

⁹ *Shepard v. Shepard*, 6 Conn. 37.

compelled to pay, and in fact had paid, on said notes, the proper debt and duty of the mortgagor, the sum of \$800;” this averment was held to be insufficient, not only with respect to the first note, for the whole sum paid might have been applied on the other notes, but with respect to the other notes also, as it only showed a payment to that amount on some one or more of them, without showing specifically on what note or notes the payment was made.¹

16. If a part of mortgaged premises have been sold or foreclosed, under a previous mortgage; they may be excepted in a bill to foreclose.² (b)

17. It is sufficient for a bill in equity by the mortgagor to allege a liquidation, tender, and refusal of the mortgage debt.³

18. A bill for redemption ought strictly to contain an offer to pay such sum as may be due on the mortgage. But if it does not, and no objection is made on this ground, the plaintiff may have leave to amend after a hearing.⁴

19. A bill alleged that the mortgagor, before the money became due, tendered the same, which the mortgagee refused on the ground that there was no right of redemption, but made no objection that the debt was not due; and prayed for an account and redelivery of the property. Held, a sufficient offer to redeem, and pay whatever was due on the mortgage.⁵

20. Where redemption is claimed, on the ground of fraud,

¹ *Shepard v. Shepard*, 6 Conn. 37.

² *Sedam v. Williams*, 4 McL. 51.

³ *Barton v. May*, 3 Sandf. Ch. 450.

⁴ *Green v. Tanner*, 8 Met. 411.

⁵ *Edgerton v. McRea*, 5 How. Miss. 183.

(b) Where a mortgage contained a stipulation for all the costs, including counsel fees, not exceeding five per cent. of the amount due; it was held, that an averment in the declaration that five per cent. was reasonable counsel fees was unnecessary, as the counsel fees stipulated to be paid were not the cause of the action, but, like the costs, a mere incident to it, and might be fixed by the chancellor at his discretion, not exceeding the amount stipulated. *Carriere v. Minturn*, 5 Cal. 435.

in not executing a bond of defeasance agreed upon, a reply, that such bond was executed, but by accident was lost, is a departure and (on demurrer) bad.¹

21. It has been held, that a mortgagor may have a decree for redemption, without bringing the money into court or making a previous tender, if the mortgagee claims the property absolutely, and resists the right of redemption.²

22. A bill in equity is not necessarily *multifarious*, because it seeks to redeem two distinct mortgages of different parcels of real estate. If two bills were filed, the defence would be the same; and there seems to be no more reason why the plaintiff's two claims should not be joined in one bill, than why two notes of hand should not be joined in one declaration.³

23. A bill in equity, brought by the widow and administratrix of a mortgagor, to redeem the estate mortgaged, is not multifarious, because the plaintiff claims to maintain her suit in both capacities. The two demands are homogeneous in their character, and it is immaterial to the defendant in which capacity the plaintiff claims. It is a claim of the same thing, though under different titles.⁴ So a bill is not multifarious, because it seeks to foreclose a mortgage upon an entire tract of land, and asks a specific performance as to one half of the land, from the heirs of the vendor of the mortgagor.⁵

24. It has been held, that the mortgagor cannot have a decree for redemption, under the prayer of general relief. The following remarks upon this subject are made by the Court in *Pennsylvania*:—"In *Cholmley v. Countess, &c.*,⁶ Lord Hardwicke seemed to consider, that whenever a mortgagee is made a party to a bill by the mortgagor, praying relief, it is the same thing as praying to redeem, because re-

¹ *Minor v. Woodbridge*, 2 Root, 274. *beck v. Edgar*, 4 Sandf. Ch. 427; *Bell v. Woodward*, 42 N. H. 181.

² *Stapp v. Phelps*, 7 Dana, 300.

³ *Robinson v. Guild*, 12 Met. 323; *Ibid.* 328, per Wilde, J. See *White-*

⁴ *Robinson v. Guild*, 12 Met. 323.

⁵ *Holman v. Bank of Norfolk*, 12 Ala. 369.

⁶ 2 Atk. 267.

demption in such a bill is the proper relief; yet in all the precedents of bills to redeem, the plaintiff is made to offer to pay debt, interest, and costs; and in the case of *Beekman v. Frost*, (18 Johns. Ch. 554,) it is expressly ruled that such an offer is essential and indispensable in a redemption bill. The plaintiff cannot be compelled to redeem on the terms of payment; it is at his election to do so or not. If he makes no offer to pay, he does not lay the foundation for a decree to redeem. Where the alleged mortgagee has been in the possession of the mortgaged premises and in the receipt of its profits, although the mortgagor is entitled to an account, yet, where, from his own showing, these profits can amount to but little more than interest on the mortgage debt, he must offer to pay the mortgagee the difference between the profits of the land and the principal and interest of the mortgage debt before he can claim relief.”¹

25. A mortgagee brought his writ of entry against the assignees of the mortgagor, not declaring as on a mortgage, and the assignees pleaded that they were entitled to redeem, and, that the judgment should be as upon a mortgage. The mortgagee replied, that the right had been foreclosed, and that the judgment should be unconditional. At the trial, the Jury found that the assignees were not entitled to redeem, and, during the pendency of questions of law reserved in the case, the assignees tendered the amount due on the mortgage, and brought a bill in equity to redeem, alleging that the suit at law was pending, and that the mortgagee was contriving unjustly to injure the assignees. The mortgagee demurred to that part of the bill seeking relief, and pleaded the proceedings at law in bar of that part of the bill seeking discovery. Held, as the plaintiff did not declare as mortgagee, the defendants were under no obligation to interpose their claim, as assignees of the mortgagor, to restrict the plaintiff to such a judgment; but, since they had done so, it opened the whole field of inquiry as to the facts and princi-

¹ Per King, President, *Lanning v. Smith*, 1 Parsons, 16.

ples, legal and equitable, on which their right to redeem was based.¹ Held, also, that the plea in bar, if not controverted, was decisive against the right of the plaintiffs to maintain their bill for discovery, based on the assumption, that their right to redeem had not been foreclosed; but, if the plea was allowed by the Court, the plaintiffs might reply to the plea, deny the truth of its facts, and put the defendant to establish them by proof.² Held, also, that the matter set forth in the bill did not entitle the plaintiffs to relief in chancery, and that they had an adequate remedy at law.³ (c)

26. With regard to the pleadings subsequent to the bill or writ; in *scire facias* on a mortgage against the executor of the mortgagor, the defendant cannot plead a plea which belongs solely to the heir or terre-tenant, as that the mortgagor in fee had only a life-estate.⁴

27. A plea of *nul tiel record* to a *scire facias* on a mortgage is a nullity.⁵

28. Where the answer sets up a mortgage upon the whole land, the defendant cannot before the Master set up another title to a moiety of it.⁶

29. Where the defendant, in a writ of entry on a mortgage, pleads the general issue, and the only question raised is, whether a certain payment was made, which question, by consent, is left to the Jury, and upon their finding in the negative a general verdict rendered; upon a hearing in chancery to settle the amount due, such verdict is not evidence.⁷

30. Where one of two joint and equal owners contracts to sell and convey the whole to two other persons, and both owners afterwards convey the whole to one of the purchasers, taking back a mortgage for the price; the other pur-

¹ York Manuf. Co. v. Cutts, 18 Maine, 204.

² Ibid.

³ Ibid.

⁴ Mendenhall v. Ocheltree, 3 Harring, 292.

⁵ Frear v. Drinker, 8 Barr, 520.

⁶ Gordon v. Lewis, 2 Sumn. 143.

⁷ Batchelder v. Taylor, 11 N. H. 129.

(c) As to the right of *amendment*, see Van Riper v. Claxton, 1 Stockt 302.

chaser can set up the contract above mentioned as a defence against the foreclosure of any more than one fourth of the land.¹ (*d*)

31. Where the mortgagor's answer denies delivery of the mortgage deed; this does not overcome the presumption arising from the plaintiff's possession of a deed, duly recorded.²

32. Where a defendant, in a suit to foreclose, sets up an absolute title, subject only to the plaintiff's mortgage, or a lien prior to all other liens, except the mortgage set forth in the bill, the decree will be conclusive against the plaintiff, as to any other claims he may have, if he neglects to file a replication, and litigate the question in the usual manner; and he should, in such case, amend his bill, setting up all his claims and incumbrances upon the premises.³

33. On a bill to foreclose, the defendant set up an agreement, by which the complainant was to receive a conveyance of part of the mortgaged premises, in discharge of the mortgage and debt, and alleged a tender of a deed pursuant to the agreement. Held, this was sufficient to show that the complainant was not entitled to relief; but, to obtain a specific performance of the agreement, the defendant must file a cross-bill.⁴

34. Questions of *set-off* have not unfrequently arisen in suits upon mortgages.

35. A suit to foreclose is *in rem*, and not personal; and it

¹ Stone v. Buckner, 12 S. & M. 73.

³ Tower v. White, 10 Paige, 395.

² Commercial, &c. v. Reckless, 1 Halst. Ch. 650. See Brown v. Woodbury, 5 Ind. 254.

⁴ Tarlton v. Vietes, 1 Gilm. 470.

(*d*) As to the defendant's plea in a foreclosure suit, see Manley v. Union, &c., 1 Branch, 160. In cases of foreclosure, where a defendant fails to answer within the time prescribed by the Court, a final decree cannot be made, but a decree *nisi* must first be given. State of Missouri v. Evans, 1 Mis. 698.

is held that an independent claim of the mortgagor against the mortgagee cannot be set off.¹

36. No set-off can be allowed under the statutes in a suit to foreclose, which would not be proper in an analogous case, in a suit at law for the mortgage debt.²

37. The Court will not set off unliquidated damages, where they are very uncertain in amount, and where the defendant has an adequate remedy at law.³ Thus a defendant in a foreclosure suit cannot set off against the mortgage debt an unliquidated claim for damages upon an injunction bond made after the commencement of suit.⁴

38. Suit for foreclosure against a purchaser of the land subject to the mortgage. Held, the defendant could not set off a fraud committed upon him more than four years after the mortgage by one not the plaintiff, nor proved to be connected with him in the fraud.⁵

39. On a bill by the mortgagee to foreclose a mortgage given for a part of the purchase-money, against a subsequent purchaser of the equity of redemption, the latter cannot set off damages accruing from the breach of an agreement of the mortgagee made with a former owner of the equity, claiming under the mortgagor.⁶

40. Where a mortgagee agreed, at the time of giving the mortgage, to release a part of the land in case it should be sold, and refuses to do so; the damages thereby caused to the mortgagor cannot be set off against the debt; nor will such damages be a subject of equitable set-off, unless the agreement specified what portion of the land should be released, or the refusal is unreasonable or unconscionable.⁷

41. Where one person agrees to advance money to another, in consideration of which a mortgage is given, and a part of the money afterwards advanced; he may maintain a

¹ *White v. Williams*, 2 Green, Ch. 376.

² *Irving v. De Kay*, 10 Paige, 319.

³ *Hattier v. Etinaud*, 2 Desau. 570.

⁴ *Thompson v. Ellsworth*, 1 Barb. Ch. 624.

⁵ *Reed v. Latson*, 15 Barb. 9.

⁶ *Vanhouten v. McCarty*, 3 Green, Ch. 141.

⁷ *Warner v. Gouverneur*, 1 Barb. 36.

suit for foreclosure, and it is no defence that the mortgagor sustained damage from not receiving the whole sum. The acceptance of a part was a waiver of any claim for such damage.¹

42. But in a suit for foreclosure brought by the administrator of the mortgagee, the defendant may set off a payment which he has been compelled to make of a previous mortgage upon other premises, sold to him subject to such mortgage, upon his agreement to pay it, and afterwards by him to the intestate, subject to the same, upon the agreement of the intestate to pay it; although the payment was made after the death of the intestate.²

43. In a foreclosure suit, the defendant cannot set off, on motion, demands against the plaintiff purchased since the commencement of suit, unless they are liquidated by judgment.³

44. A subsequent mortgagee, on a bill to redeem against a purchaser under a foreclosure of a prior mortgage, is entitled to set off, against the amount due upon the prior mortgage, the rents and profits since the purchase, deducting the value of permanent improvements made by the purchaser.⁴

45. A., having purchased an incumbrance on the estate of B., had agreed to give B. \$500 for two years' rent, (at \$250 per annum,) in part discharge of the incumbrance. C. then bought the incumbrance of A., and, with the assent of B., paid to A. the two years' rent in horses, which sum was credited, and A. discharged from his lease, C. becoming lessee in his stead. Held, the credit for \$500 should have been allowed in a decree to foreclose, and an account of the rents and profits, during C.'s occupancy, accruing subsequently to the expiration of the two years, should have been taken, but a reasonable abatement should be made on account of a sale of part of the premises by B. to D., to the exclusion of C.⁵

46. Under the Revised Statutes of New York, a set-off

¹ *Dart v. M'Adam*, 27 Barb. 187.

² *Rawson v. Copland*, 3 Barb. Ch. 166.

³ *Knapp v. Burnham*, 11 Paige, 330.

⁴ *Vroom v. Ditmas*, 4 Paige, 526.

⁵ *Ballinger v. Worley*, 1 Bibb, 197.

may be allowed in a foreclosure suit, of a debt due and payable when that suit was commenced. So of a judgment at law in favor of the defendant against the plaintiff. But not of a demand against the plaintiff as a surety for a third person, for which the defendant has sufficient security upon a fund of the principal.¹

47. A set-off may be claimed by *answer*. A cross-bill is unnecessary.²

48. Where there are several suits to foreclose, against one defendant, who claims a set-off in each, exceeding the interest, he will not be compelled to elect to which he will apply it.³

49. With regard to the *evidence* in suits upon mortgages, proof of the execution, delivery, acknowledgment, and recording of a mortgage from a third person to the demandant, is sufficient, *primâ facie*, to sustain a writ of entry to recover the land mortgaged.⁴ (*Infra*, § 54.)

49 *a*. It is held that a technical variance between the mortgage alleged and proved is immaterial.⁵

50. Where a mortgage is made to A. as guardian, and the notes simply to A., the variance is immaterial.⁶

51. If a party attempts to set forth the condition of a mortgage in a suit for foreclosure, any variance is held fatal. But the bill may be amended.⁷

52. Where usury is set up to a bill for foreclosure, strict proof of the usurious contract alleged is necessary.⁸

53. A debt payable on demand, and secured by mortgage, is due immediately. No previous demand is necessary to foreclosure. The commencement of a suit upon the bond, or for foreclosure in chancery, is equivalent to a demand.⁹

54. A mortgage, duly acknowledged, is held sufficient evidence for the plaintiff.¹⁰ (*Supra*, § 49.) And production of

¹ Holden v. Gilbert, 7 Paige, 208.

² Chapman v. Robertson, 6 Paige, 627.

³ M'Lane v. Geer, 3 Edw. Ch. 245.

⁴ Burrige v. Fogg, 8 Cush. 183.

⁵ Hadley v. Chapin, 11 Paige, 245.

⁶ Walker v. Sellers, 11 Ind. 376.

⁷ Ames v. Ames, 5 Wis. 160.

⁸ Richards v. Worthley, 5 Wis. 73.

⁹ Gillett v. Balcom, 6 Barb. 370.

¹⁰ Den v. Wade, 1 Spenc. 291.

the note and mortgage, with proof of service of summons, justifies a decree of foreclosure, on default.¹ So the recital of indebtedness in the mortgage is sufficient *primâ facie* proof thereof in a foreclosure suit.²

55. In case of foreclosure without producing the mortgage, the objection is held to be waived.³ And where a foreclosure has been decreed, due execution of the bond and mortgage will be presumed; and a party, applying for leave to come in and defend, must specifically state his objections to those securities, either upon his own oath, where the facts are within his knowledge, or supported by the affidavit of an informant.⁴ More especially, the execution will be presumed from the record in an appellate court.⁵

56. Where a bill for foreclosure alleges the existence of the notes and mortgage, their execution may be proved *vivâ voce* at the hearing; and a recital in the decree, that such proof was made, is sufficient, without setting out the evidence.⁶

56 *a*. In a proceeding to foreclose a mortgage, where the answer admits the execution of the mortgage and note, and does not deny that the amount claimed in the petition is due, there is nothing for the plaintiff to prove.⁷ But an admission, upon a bill for foreclosure, of the mortgage and personal securities, will not dispense with their production, or an account of their absence, in order that the Court may know the amount due at the time of decree.⁸

57. Where a statute provided, that before decree on a bill taken *pro confesso* the Court should be satisfied by sufficient evidence of the justice of the complainant's claim or demand; the Court remarked: "The statute does not prescribe the grade of evidence, but it must certainly be such as will guide and direct the mind to a conclusion, or else it cannot satisfy

¹ Harlan *v.* Smith, 6 Cal. 173.

² Whitney *v.* Buckman, 13 Cal. 536.

³ Dunshee *v.* Parmalee, 19 Verm. 172.

⁴ People's, &c. *v.* Hamilton, 10 Paige, 481.

⁵ Inge *v.* Boardman, 2 Ala. 331.

⁶ Judson *v.* Emanuel, 1 Ala. (N. S.) 598.

⁷ Cooley *v.* Hobart, 8 Clarke, (Iowa,) 358.

⁸ Beers *v.* Hawley, 3 Conn. 110. See White *v.* Morrison, 11 Ill. 361.

it that the claim or demand is just. It is important to the decree, that the record should show affirmatively enough to sustain it. To do this, the mortgage should have been produced and proved, and its non-production is error."¹

58. If the declaration alleges execution of the mortgage, an assignment to the plaintiff, and his consequent seisin in fee; he is bound to prove such execution and assignment, though not expressly denied.²

58 *a*. Where, in a suit on a note and mortgage, the existence of the mortgage alleged in the petition is denied by the plea, judgment of foreclosure cannot be rendered without a verdict on the issue presented by the plea.³

59. It has been sometimes held, that mortgage notes need not be produced, unless negotiable.⁴ But the prevailing rule is, that, as the mortgage is merely incident to the debt, such debt must be proved, and the note or bond produced, or its absence explained.⁵

60. Where a mortgagor has released the equity of redemption in satisfaction of the note; in an action of ejectment brought by the mortgagee, he need not produce such note.⁶

61. Where the bill alleges loss of the mortgage bond, such loss must be proved, or the mortgagor will not be required to accept a bond of indemnity against it.⁷

62. When a mortgage is given to secure a note, and at the same time a contract of sale of the land mortgaged, with other land of which the mortgagee goes into possession, is entered into between the same parties, for which the note was to be part payment, the mortgagee being at liberty to rescind the sale within a certain time; an action for the foreclosure of the mortgage against the heirs of the mortgagor, most of them minors, must show the existence of the note and the due rescission of the contract of sale.⁸

63. Any interest in the mortgagee entitles him to foreclo-

¹ *Wilkins v. Wilkins*, 4 Port. 245, 249, 250.

² *Warner v. Brooks*, 14 Gray, 109.

³ *May v. Taylor*, 22 Tex. 348.

⁴ *Brown v. Sadler*, 13 La. An. 205.

⁵ *Lucas v. Harris*, 20 Ill. 165; *Bennett v. Taylor*, 5 Cal. 502.

⁶ *Marshall v. Wood*, 5 Verm. 250.

⁷ *Burgwin v. Richardson*, 3 Hawks, 203.

⁸ *Carr v. Fielden*, 18 Ill. 77.

sure against the mortgagor.¹ But a complainant in a suit to foreclose, who has parted with his interest in the mortgage before answer, cannot maintain the suit.²

64. A bill of foreclosure, though it does not show the true consideration for, or the precise amount due upon, the mortgage, will authorize a decree. So, though the proofs show less to be due than is claimed, or a state of facts not alleged; if not inconsistent with the averments in the bill.³

65. Where a bill in equity is filed, to foreclose mortgages made to secure several balances due on different accounts, they are *primâ facie* evidence of the amount due. If the mortgagor denies the amount, the *onus* is on the mortgagee, to establish the amount. But if there be no general order of Court, which throws open the whole amount to be surcharged and falsified, the mortgagor can only surcharge and falsify the items pointed out in his answer.⁴

66. In Pennsylvania, upon *scire facias* on a mortgage, by the holder of one of several obligations thereby secured, the mortgage not showing the dates at which they became due; the plaintiff need not prove that all had matured one year prior to the suit; but the burden is on the defendants to prove the contrary.⁵

67. Action to foreclose a mortgage, conditioned to perform an obligation on the part of the mortgagor to pay all the mortgagee's debts. One alleged breach of the condition was, that the obligor had failed to pay a sum due from the mortgagor by way of contribution to his co-contractors, in an agreement made by him and them with a third person, prior to the mortgage. Held, such co-contractors were competent witnesses for the plaintiff, to prove their claims on him for contribution.⁶

68. The affidavit of the orator, in a bill for foreclosure, is inadmissible, on the question of shortening the time of redemption.⁷

¹ *Wooden v. Haviland*, 18 Conn. 101.

⁴ *De Mott v. Benson*, 4 Edw. Ch.

² *Wallace v. Dunning*, Walk. Ch. 297.

⁵ *Roberts v. Halstead*, 9 Barr. 32.

⁶ *Stewart v. Clark*, 11 Met. 384.

⁷ *Beedle v. Cook*, 11 Verm. 206.

³ *Collins v. Carlile*, 13 Ill. 254.

69. On a bill to redeem, brought by the assignee of the equity against the assignee of the mortgagee, to whom the mortgage had been made as security against the incumbrances on certain land, it did not appear that the condition had been performed. Held, that, although the objection would be good at law, yet if it was alleged that the incumbrance was extinguished, or that the plaintiff was ready to satisfy whatever was due thereon, the bill could be sustained.¹

70. It seems, that if the condition was not satisfied at the commencement of the suit, yet, if he could now show that it was, or could be satisfied, the plaintiff would be entitled to relief.²

70 *a*. A subsequent incumbrancer, claiming title under tax-deeds which have been foreclosed against the mortgagor, and who is made defendant to a bill to foreclose brought by the assignee of the mortgagee, in a case where the conclusiveness of such foreclosure depends on the question whether or not such assignee was a prior incumbrancer; has a right to insist that the complainant make out his right to a decree against the mortgagor by sufficient testimony, even though the mortgagor, a party defendant, confess the bill.³

70 *b*. Where upon the evidence it was left doubtful at what time possession was taken; held, the defendant having failed to prove this defence, the action was not barred.⁴

70 *c*. A. and B. having contracted, A. to buy and B. to sell a tract of land, A. agreed to receive a deed of it, as soon as it could be conveniently executed, and to give a mortgage to secure the purchase-money; accordingly, he executed and left with the agent of B. a mortgage, and B. executed and sent to his agent a deed for delivery. In a suit to foreclose the mortgage, A. cannot insist that it is without consideration.⁵

71. The *judgment* or *decree* in a suit upon a mortgage varies, of course, as the proceeding is at law or in equity, for

¹ Upham v. Brooks, 2 Story, 623.

² Ibid.

³ Bleidorn v. Abel, 6 Clarke, (Iowa)

⁴ Montgomery v. Chadwick, 7 Clarke, (Iowa) 114.

⁵ Farmers', &c. v. Curtis, 3 Seld. 466.

foreclosure or redemption. (e) It has been seen, that by statutory provision, in some of the States, a court of law is authorized to render such judgment, as substantial justice between the parties may require; and in Chancery this power exists and is commonly exercised, without express authority to that effect, by the constitution and usage of the Court itself.

72. A conditional judgment, on a writ of entry to foreclose, is conclusive evidence of the amount then due on the mortgage, in a subsequent suit to redeem.¹

73. The decree as to the sale of mortgaged property should be regulated by analogy to sales made under execution.²

74. One question, which has frequently arisen as to the form of decree, grows out of the fact, that the mortgage debt is made payable *by instalments*, only a part of which are due.

75. In general, a decree, to enforce payment of debts secured by mortgage, should not include those not yet due.³

75 a. Where a statute provides, that in a suit for foreclosure judgment shall be rendered for the amount which may be due on such mortgage; in case of a debt payable by instalments, upon failure to pay one of these, resort must be had to a court of chancery for a provisional decree of foreclosure.⁴

76. Where the property was reported by a Master to be indivisible, only one instalment being due at the filing of the

¹ Sparhawk v. Wills, 5 Gray, 423.

³ King v. Longworth, 7 Ham. 2d

² Oldham v. Halley, 2 J. J. Mar. Part, 231.

113.

⁴ Jones v. Lawrence, 18 Geo. 277.

(e) In California, under Practice Act, § 147, upon default in a foreclosure suit, no relief can be given other than that prayed for. *Rann v. Reynolds*, 11 Cal. 14.

The clause in the decree, foreclosing the equity of redemption, is a useless formula; the effect of the decree in that respect is determined by the statute, and not by the form given the decree in any particular case. *Montgomery v. Tutt*, 11 Cal. 307.

bill, it was decreed that the defendants pay the instalments due and not due in ninety days, or the whole property be sold. Held, the decree should have been, that the instalment due be paid, or the whole property sold to pay the whole debt.¹ So, where it is provided that the whole debt shall be considered due; when any part is due, a judgment may be rendered accordingly; but on payment of the amount due proceedings shall be stayed.² So a mortgage to secure instalments was conditioned, that, upon default in one, the whole should become due at the option of the mortgagee. Held, the mortgagee must give notice of that option before suing for the whole. And a complaint, setting out the whole debt as the cause of action, and not averring an election by the mortgagee, and notice thereof, was held bad on demurrer.³

77. Upon this subject it has been said: "Under an ordinary mortgage of land for an aggregate debt, payable in instalments, the mortgagee, upon default in any payment, may enter or bring an ejectment, and retain possession of the whole, subject to an account for the profits; because, the condition being indivisible, a failure to pay any part of the debt is at law a forfeiture." But it has never been adjudged, that for a failure to pay one of several instalments a court of equity would decree a conclusive foreclosure as to the whole property.⁴ So it has been held, that in a bill for foreclosure, where only one of several instalments is due, and the property is divisible, the decree should be for a sale of enough only to pay such instalment. A decree for sale of the whole, and that the proceeds be paid into Court, to be applied to the instalments as they fall due, is erroneous.⁵ More especially, where such course is unnecessary. And if such decree has been made, the Court, in its discretion, will regulate its execution.⁶

¹ *Lacoss v. Keegan*, 2 Cart. 406.

² *Allen v. Parker*, 11 Ind. 504; *Howe v. English*, 6 Mis. 262; *Wood v. Trask*, 7, 566.

³ *Basse v. Gallegger*, 7 Wis. 442.

⁴ Per Robertson, C. J., *Caufman v. Sayre*, 2 B. Monr. 204.

⁵ *James v. Fisk*, 9 Sm. & M. 144.

⁶ *American, &c. v. Ryerson*, 2 Halst. Ch. 9.

78. In Indiana, by the statute of 1831, where a mortgage was payable by instalments, a bill for foreclosure would not lie till the last became due.¹

79. In Alabama, it is erroneous to order successive sales, as several instalments fall due. The decree should be for the amount then due, and the property ordered to stand as security for the remainder.²

80. Suit to foreclose a mortgage, on which only \$35 were due. Held, though the Court has power in such case, under the statute, to order a sale for instalments not due; yet, as the statute was not imperative, and as nothing appeared at that stage of the suit making such a course proper, the Court would not entertain the cause.³

81. Judgment was recovered upon a bond secured by mortgage, conditioned for the payment of money by instalments, and execution for the instalment then due was issued and returned unsatisfied, but was afterwards paid. Held, that before the mortgage could be foreclosed, either under the statute or by a bill in chancery, for non-payment of an instalment which subsequently became due, an execution for that instalment must issue, and be returned unsatisfied.⁴

82. Under the New York Revised Statutes, no decree for sale can be made, where only part of the debt has become due, until there has been a reference and report, as to the situation of the premises.⁵

83. There may be a foreclosure for non-payment of an instalment, although the mortgage be given expressly "to secure payment of the notes when they become due."⁶ So where the mortgagee is an indorser on several notes, but has paid only one, he may still maintain a bill to foreclose.⁷

84. It is held in Maryland, that where a debt secured by mortgage is payable by instalments, the mortgage becomes forfeited by non-payment of the first, and may be foreclosed

¹ *Hough v. Doyle*, 8 Blackf. 300; contra, *Cecil v. Dynes*, 2 Cart. 266. See *Walker v. Sellers*, 11 Ind. 376.

² *Walker v. Hallett*, 1 Ala. (N. S.) 380.

³ *Mitchell v. Tighe*, Hopk. 119.

⁴ *Grosvenor v. Day*, 1 Clark, 109.

⁵ *Ontario, &c. v. Strong*, 2 Paige, 301.

⁶ *Hunt v. Harding*, 11 Ind. 245.

⁷ *Beckwith v. Windsor, &c.*, 14 Conn. 594.

immediately. If a bill is filed for that purpose, the debtor may prevent a foreclosure or sale by paying the instalment then due ; but, if he fails to do so, the mortgage may be entirely foreclosed, or so much of the property sold as will satisfy the sum due at that time ; and the decree will be allowed to stand as security for the other instalments ; as in case of a judgment at law for an annuity. But if the property cannot be conveniently or safely sold in parcels, it must be disposed of entire, and the whole debt raised and paid, with a rebate of interest on the sums not due at the time of paying over the proceeds to the creditor. This is done from necessity, and as an unavoidable consequence of the peculiar nature of the case.¹

85. It was early held in Massachusetts, that to an action upon a mortgage, securing a note payable by instalments, it is no defence, that all the instalments are not due. The Court said, there was nothing in the objection, and that it had been repeatedly overruled.² So, in Indiana, judgment by default for the foreclosure for the whole debt of a mortgage given to secure two notes, both of which were due, although as to one this did not appear on the record, was held to be proper.³

86. A., being indebted to B., mortgaged to him certain premises ; and, subsequently becoming further indebted to him, made a second mortgage, including the lands mentioned, together with four other pieces of land. On a bill for foreclosure, brought by the mortgagee, it was held, that if A. should fail to pay both debts within a limited time, he should be foreclosed, and that the Court would not make a separate decree for each debt.⁴

87. Where a debt payable in instalments is secured by mortgage, which provides, that on failure to pay any one of them, the whole should be payable, deducting interest to the

¹ *Salmon v. Clagett*, 3 Bland, 179, 180 ; 5 Gill & J. 314 ; acc. *Levert v. Redwood*, 9 Port. 79 ; *Peyton v. Ayres*, 2 Md. Ch. 64 ; *Wylie v. McMakin*, 2 Md. Ch. 413 ; *Baker v. Lehman*, Wright, 522.

² *Estabrook v. Moulton*, 9 Mass. 258.

³ *Carter v. Simons*, 12 Ind. 476.

⁴ *Phelps v. Ellsworth*, 3 Day, 397.

time when it would become payable, had there been no default; held, a bill to foreclose would lie on a default in payment of any instalment, and that the above provision was not a penalty.¹

88. Where a mortgage is inadequate security, and the mortgagor is irresponsible, although the whole mortgage debt is not due, the Court will order a sale of the whole premises, or sufficient thereof to pay the whole debt and costs, unless the mortgagor will, before sale, pay the amount due, or give security that the residue of the debt shall be paid when it falls due.²

89. Upon a bill to foreclose two mortgages, the first payable by instalments, and a part thereof due, but the junior mortgage wholly due and unpaid, the Court directed a sale of so much as would satisfy the whole of both mortgages, unless the defendant should, before the sale, pay the amount due, with costs.³

90. A judgment of foreclosure, on a mortgage covering several instalments, may include an instalment fallen due between the time of the rule *nisi*, and the rule absolute.⁴

91. A bill to foreclose a mortgage payable by instalments alleged that \$100 was then due, which the answer denied. That sum was not due at the time of answering, but had become due at the time of the hearing. Held, the Court had jurisdiction.⁵

92. Entry for non-payment of one instalment. Bill in equity to redeem, after all had become due. Held, the plaintiff could not redeem without paying the whole.⁶

93. If, in such case, the defendant refuse to receive instalments not due; a special decree will be made, that the case stand open, and the mortgagee retain possession till the whole is due. Shaw, C. J., says: — "The argument of the plaintiff seems to go upon the ground, that it was the intent of the statute to give a mortgage debtor the additional term

¹ Andrews v. Jones, 3 Blackf. 440.

² Suffern v. Johnson, 1 Paige, 450.

³ Hall v. Bamber, 10 Paige, 296.

⁴ Lawrence v. Jones, 20 Geo. 342.

⁵ Smalley v. Martin, 1 Clark, 293.

⁶ Mann v. Richardson, 21 Pick. 355; acc. Adams v. Brown, 7 Cush. 223.

of three years' credit beyond that stipulated by the parties, for all sums. But this is not so; the provision of the statute was intended to avoid a forfeiture. The mortgagor is allowed to redeem and regain the title and possession of the estate, on paying all that is due, and performing the condition so far as he can. This requires, that he shall pay all that is due at the time of the decree. The argument goes on the assumption that after there is an entry for condition broken, there must be a new entry or a new notice, on the breach of each subsequent condition. But we think it is not so. Until a breach of condition, the rights of the parties are legal and not equitable. But after breach of condition it is otherwise." "The mortgagee's entry shall be referred to his right, and he shall be presumed to have entered as well for the purpose of foreclosing as for taking the rents and profits. Then he has no need of giving any notice of further breach of condition. By the breach of any condition, the estate is his, at law. The rights of the mortgagor are equitable only. When he comes to ask equity, he must do equity by paying all that is due on the mortgage. The plaintiff is bound to pay all that is due at the time the account is taken. The prayer is, that an account may be taken of what is due; and the plaintiff must, by his bill, declare his readiness to pay the amount which may be found to be due. It is analogous to an action on a penal bond. On a breach shown, the plaintiff recovers all that is due at the time of the hearing in chancery, although part of it has fallen due since the action brought."

94. Mortgage, to secure a debt payable by instalments. Upon failure to pay the first, the mortgagee brings a bill to foreclose, and, pending the bill, the last instalment became due. It was contended for the defendant, 1st, that the suit was prematurely brought; 2d, that the decree should be only for the amount due at the filing of the bill. The Court say: "The suit, being a bill in equity, ought rather to be governed by the liberal principles which govern in covenant, assumpsit, and special agreements, than those technical and rigid

rules which are applicable to the action of debt only. The suit was properly commenced, although but one of the instalments was due." In regard to the second point, the Court say : — " The Chancellor having once jurisdiction of the cause, ought not to turn the parties round at the hearing, to begin *de novo*, but should go on and finish the controversy. The last instalment became due before the cause was heard; so that the Chancellor might well, as he has done, embrace the whole case in the decree." ¹

95. The failure to pay the second instalment ordered by a decree of foreclosure, and falling due while a bill is pending to be relieved from the forfeiture for not paying the first, affords no ground of objection to a decree in favor of the orator in such bill.²

96. A decree authorized the trustee to sell enough of the mortgaged property to pay the amount then due; but the execution of this decree was prevented by injunction, and in the mean time other instalments of the mortgage debt became due. The injunction being dissolved, the trustees sold enough to pay the amount due at the time of sale. Held, the decree stood for the entire debt; that the Court, upon application, would have authorized the doing of what had been done, and would therefore give its subsequent assent.³

97. Where the bill avers that the three last of four notes secured by a mortgage are unpaid, it will be implied that the first has been paid. If the note is outstanding in the hands of an assignee, the answer must so allege.⁴

98. In Michigan, if a mortgage debt is payable by instalments, and the land sold on default in payment of one of them, for the amount of such instalments; the premises are discharged of the others.⁵ It seems, the mortgagee might protect himself by selling the whole mortgage debt, or by an express reservation of a lien for the balance.⁶

99. Where a mortgage contains several conditions, and

¹ Adams v. Essex, 1 Bibb, 149; acc. Smalley v. Martin, 1 Clark, 293.

⁴ Levert v. Redwood, 9 Port. 79.

⁵ Kimmell v. Willard, 1 Dougl. 217.

⁶ Ibid.

² Pierson v. Claves, 15 Verm. 93.

³ Clark v. Abbott, 1 Md. Ch. 474.

the mortgagee enters for breach of one only, the mortgagor may prevent a foreclosure by tendering performance of this alone, and upon a bill in equity may have judgment for possession, unless the mortgagee in his answer sets up his general right under the mortgage, or has declared that he holds for breach of another condition ; in which case, a special decree may relieve the mortgagor from the effects of the breach for which the entry was made, and leave the mortgagee in possession of his legal rights.¹ If only interest is due and entry made for its non-payment, and the mortgagor tenders the principal also, but the mortgagee refuses the money, expressing no willingness to receive even the interest ; the tender will be a valid one.² In such case, the mortgagor may legally demand a release of the mortgage, so far as it is a security for the interest.³

100. Where a mortgage is made for two debts, and the mortgagee enters for non-payment of the only one due, and the mortgagor brings a bill to redeem ; and, upon maturity of the other, makes a new tender and files a supplemental bill ; such bill should allege the tender, but, no plea or answer being filed, may be amended without costs.⁴

101. The receipt of the second instalment due under a decree of foreclosure, when the first is overdue and unpaid, is a waiver of any forfeiture which has then accrued, but does not vacate the decree in relation to subsequent instalments.⁵

102. An interlocutory decree, in a suit to foreclose, directed the mortgagor to pay the sums due the complainants, not specifying them. Afterwards a decree was made, reciting that the mortgagor had failed to pay as ordered, and directing a sale of so much of the property as would pay to certain mortgagees a certain sum, which did not appear from any part of the record to be the true sum. Held, both decrees were wholly erroneous ; that the former should have ascertained the amounts due each complainant and stated them ; that all the joint mortgagors should have been made

¹ *Saunders v. Frost*, 5 Pick. 259.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Smalley v. Hickok*, 12 Verm. 153.

parties; that the decree for sale should have identified the property to be sold, and have provided, in case of its insufficiency to pay all the mortgages, for a *pro rata* distribution of the proceeds.¹

102 *a*. In April, 1845, a decree *pro confesso* was obtained by A. against B., in a suit for the foreclosure of a mortgage for \$27,727.24. In September following, the mortgaged premises being then advertised to be sold under the decree, on the 6th of October, 1845, B. made a proposition for the payment of the mortgage debt, to which A. acceded. A. wrote to his solicitor, authorizing him, on certain conditions, to enter into a stipulation with B. on the terms proposed, one of which was that \$1,100 should be paid by B., and the arrangement completed on or before the 1st of October. No part of the money was paid as proposed. On the 5th of January, 1846, B. paid to A.'s solicitor \$1,100. A.'s solicitor apprised him of what had been done. A. directed that \$500 of the \$1,100 be applied to the payment of the interest up to the 1st January, 1846, on \$20,000; and authorized his solicitor to enter into a stipulation on the payment of \$19,500, with interest semi-annually, in certain specified instalments, to discharge the debt and release the property mortgaged, the stipulation to contain a reservation of all rights under the mortgage and decree of sale, provided the stipulated payments of interest and on account of principal are not regularly made. B. failed to make any of the subsequent payments. Held, that, under these circumstances, the court could not declare that the amount of the decree was reduced to \$20,000.²

103. Mortgage to secure two notes. Upon maturity of the first, the mortgagee foreclosed and sold, and the proceeds were more than sufficient to pay the first note. Held, the surplus in the hands of the sheriff was discharged from the lien, and creditors recovering judgments prior to foreclosure upon the second note were entitled to receive it.³

¹ Hopkins v. Ward, 12 B. Mon. 185.

³ Hobby v. Pemberton, Dudley, 212.

² Ryerson v. Boorman, 4 Halst. Ch. 66, 701.

104. Pending a suit to foreclose, for non-payment of the first instalment, the mortgagee assigned the second, and, by a separate instrument, agreed that no sale should take place under the decree before the second should become due, nor for a less sum than the amount of both instalments, and that the sale should be for the benefit of the assignee after satisfaction of the first payment due. Held, upon a purchase by the mortgagee under the decree of foreclosure and sale, no trust in the land resulted to the assignee.¹

105. Where mortgaged premises are sold, under a foreclosure, subject to the lien of a future instalment, the land becomes the primary fund for payment of the debt; and, if the premises are purchased by the mortgagee, the mortgage debt is extinguished.²

106. Upon a bill for foreclosure for non-payment of \$42 interest, held not sufficient to give the Court jurisdiction, under the Revised Statutes of New York, that it appeared by the report of the Master that the premises could not be sold in parcels, and that the defendant was in possession, and insolvent.³

107. In case of a mortgage payable by instalments, and a bill filed by the mortgagee upon default of payment of the first instalment, the Court will stay proceedings, on condition that the defendant consent to a decree of foreclosure, subject to the order of the Court, upon subsequent default, and pay the sum actually due.⁴

108. A. conveyed to B. and others, for \$20,000, subject to the unexpired term of C., under a lease from A., taking back a mortgage for the purchase-money. It was agreed that A. should receive the rent so long as C. remained in possession, and pay B. and others the interest. The first instalment became due on the mortgage, and A. proceeded to foreclose, and the bill was taken as confessed as against the mortgagors. Held, the amount due from A., by virtue of the agreement to pay interest, should be deducted from the mortgage,

¹ Norton v. Stone, 8 Paige, 222.

² Cox v. Wheeler, 7 Paige, 248.

³ Douw v. Sheldon, 2 Paige, 323.

⁴ Lansing v. Capron, 1 John. Ch. 617.

and a reference was directed to a Master to ascertain the balance.¹

109. Most of the preceding cases relate to instalments of the principal. Similar questions, as we have seen, arise from the non-payment of *interest*. In *Stanhope v. Manners*,² interest was payable periodically, on each of several instalments of principal, and the mortgagee had, by an express stipulation in the mortgage, the election to call in his money on a default in the payment of any one instalment of interest. On a failure by the mortgagor to pay the rest, the mortgagee having elected to call in the whole debt, the Court decided that he had a right so to do, and therefore to foreclose the equity of redemption as to all the instalments and the whole estate. So, it is said, "the non-payment of interest, where it is expressly stipulated for, is no less a breach of condition here than in England; or than the non-payment of an instalment of the principal. In a word, the interest is part of the *substance* of the mortgage debt. It belongs not to it by *tacking*; it is not an *incident* of the debt, but *pro tanto* it is the debt itself. The parties anticipated it at a fixed rate of increase, and it was just as sure to accrue as time was to last. A judgment at law for it must have the same effect as a judgment for any other part of the mortgage debt. On a judgment for an instalment of the principal, a virtual foreclosure of the mortgage is effected by a sheriff's sale; the equity of redemption in the mortgagor is extinguished, and the legal estate still in him is transferred, and the lien of the mortgage is divested. It follows as a necessary conclusion, that the same consequences must attend a sheriff's sale of the mortgaged premises made upon a judgment obtained for the interest."³

109 *a*. A bill prayed for foreclosure and sale, and payment of the amount due for principal and interest, and for general relief. The interest only was due. Held, that a decree therefor was proper, and consistent with the prayer; and

¹ *Disbrow v. Jones*, Harring. Ch. 102.

² 2 Eden, 197.

³ Per Woodward, President, *Bank v. Chester*, 1 Jones, 290. See *Carpenter v. Carpenter*, 6 R. I. 542.

that the defendant could not object that the decree was not for the whole amount, to be enforced in part, and thereafter on default for the balance.¹

110. Bill in equity to redeem. The entry to foreclose was made before the principal debt had become due, for non-payment of interest. The bill was filed, but no decree pronounced, before the principal was due. Held, in order to redeem, the mortgagor must pay the whole principal and interest.²

111. Upon a principle analogous to that referred to in equity proceedings for foreclosure, the conditional judgment upon a mortgage shall include the whole amount due at the time it is rendered; not merely what was due at the commencement of suit.³

112. Where a mortgage is made to secure the performance of various acts from time to time, other than the payment of money, in a real action for foreclosure, the Court, in order to accomplish the purposes of the mortgage, may enter any decree from time to time, *loties quoties*, which may be made in a suit in equity, and issue any process to carry such decree into effect.⁴ So, where a mortgage was made to secure several notes, payable in successive years, and, upon non-payment of one, a suit was brought and judgment recovered for the amount of the note, and possession taken; held, the mortgagor could not redeem, without tendering the amount due on the other notes within the year from the time of their maturity. The Court say: "The mortgagee holds for the breach of all conditions which occur during the time of his possession, unless there is something to rebut or control such a result."⁵

113. A decree for sale cannot be made, on a bill to have the mortgage recorded, although it pray for general relief.⁶

114. In case of a mortgage to secure performance of work,

¹ Ames v. Ames, 5 Wis. 160, 169.

² Adams v. Brown, S. J. C. Mass. March, 1851, Law Rep. May, 1851, p. 37; 7 Cush. 220. See Mass. Rev. Stats. Ch. 107, §§ 14-23.

³ Stewart v. Clark, 11 Met. 384. See Knapp v. Burnham, 11 Paige, 330.

⁴ Stewart v. Clark, 11 Met. 384.

⁵ Deming v. Comings, 11 N. H. 474.

⁶ Chalmers v. Chambers, 6 Har. & J. 29.

a decree of foreclosure for a balance found due from the contractor is erroneous.¹

115. A decree in a bill to foreclose, directing a sale, must find the exact amount due, and not leave it to be calculated by the ministerial officer.² If the amount is uncertain, it should be referred to an auditor, before any decree for sale.³ And a decree for sale before the report comes in and is confirmed is erroneous.⁴

116. On a bill to redeem, it is erroneous to decree the property to be given up, before the sum due is paid or tendered.⁵

117. Where two lots are included in a mortgage, and only one was meant to be mortgaged, there may be a foreclosure of that lot.⁶

118. If it appears, upon a bill of foreclosure, that the plaintiff acquired any estate, which is still subsisting, by virtue of his mortgage deed, he is entitled to a foreclosure of that estate.⁷

119. In such case, the Court will not ordinarily go into an inquiry as to the quantity of estate mortgaged.⁸

120. Where the defendant, in his answer to a bill of foreclosure, admitted that the plaintiff acquired a valid title to all the mortgaged premises, except twenty acres thereof, and alleged that the mortgagor had not, at the time of executing the mortgage-deed, any interest in said twenty acres, and that the whole title to the same had become vested in the defendant; it was held that, in default of payment of the mortgage debt, the plaintiff was entitled to a decree foreclosing the defendant of the right to redeem the property conveyed by the mortgage, leaving the parties at liberty to contest the title to the twenty acres, in an action at law, which was the legitimate mode of determining its validity.⁹

¹ *Petne v. Wright*, 6 S. & M. 647.

² *Wernwag v. Brown*, 3 Blackf. 457.

³ *Wylie v. McMakin*, 2 Md. Ch. 413.

⁴ *Graham v. King*, 15 Ala. 563;

Gardiner v. Garniss, Hopk. 306.

⁵ *Reed v. Lansdale*, Hardin, 6.

⁶ *Conklin v. Bowman*, 11 Ind. 254;
Walker v. Sellers, Ib. 376.

⁷ *Hill v. Meeker*, 23 Conn. 592.

⁸ *Ibid.*

⁹ *Ibid.*

121. Nice questions as to the form of judgment often grow out of the *joint* interest of different parties in the debt secured or the estate mortgaged, or the union of separate estates in one mortgage.

122. Upon a bill brought by two persons to foreclose a mortgage for their joint debt, a decree cannot be made for the separate debt of one of them, which is not set forth in the bill, though it appears from the subsequent proceedings.¹

123. *Claim* filed for foreclosure. It appeared that there were two separate mortgages, affecting separate estates, both effected by the same mortgagor to the same mortgagee. The mortgagee had the legal title to both estates; and claimed to treat the mortgages as one security, and to foreclose both estates on non-payment of the aggregate amount of the mortgage debts. The mortgagor objected to this amalgamation of securities, and claimed that the mortgagee could only foreclose each estate separately, on non-payment of what was secured upon it. This view was sustained by the Court, and a decree passed for foreclosure of each mortgage separately.²

124. Hunting made a mortgage to Peck, which Peck assigned to Hapgood. Peck also mortgaged another tract for security of another debt to Hapgood, whose executors bring an action to recover both the tracts against Peck. Judgment was rendered, that the plaintiffs recover possession of both tracts, unless within two months the defendant should pay the amount of both the mortgage debts and costs. Held, upon writ of error, that such judgment was erroneous for the whole.³ Shaw, C. J., remarks:⁴ — “ We think there can be no reasonable doubt, that even in a case where the same person is the mortgagee in two distinct mortgages, to secure several debts, and the same person is mortgagor, the two could not be united in one suit, so as to have one consoli-

¹ Barraque v. Manuel, 2 Eng. 516.

² Smeathman v. Bray, 8 Eng. Law & Eq. 46.

³ Peck v. Hapgood, 10 Met. 172.

⁴ Ib. 172.

dated conditional judgment; though we have not been referred to any decided case to that effect. It seems contrary to principles, and to a just construction of the statute. It would be to hypothecate each parcel of the mortgaged premises for the debt secured by the other, which the parties themselves have not done. Then, there are so many dependent and derivative rights to each, which may be held by different persons, as assignees or attaching creditors of each equity of redemption, that such consolidated judgment would tend to produce a confusion of rights and consequent injustice."

125. But an assignee of two mortgages of the same land, made by the same person, though at different times, and to different mortgagees, may join them in one action for foreclosure, and recover a conditional judgment, specifying the amount due on each, and ordering a writ of possession, unless both sums shall be paid in two months. The Court make a distinction between the case of *Peck v. Hapgood*,¹ where the two mortgages embraced distinct parcels of land, and the debts were due from different persons, and the present case, where the land and the debtor were the same. "The object of the suit is, to have payment of the debt for which the land is hypothecated, or possession of the land itself. As between these parties, the debtor can neither redeem nor stay the writ of *habere facias*, without paying both sums. Payment of either one would not clear him, any more than payment in part of a single debt. (*f*) But, as it is possible that the rights of some other party may intervene, it is proper for the judgment to specify the amount due on each note, and then add, that unless both said sums, amounting in all to, &c., be paid within two months, then a writ of seisin to issue. The power is given to the Court, under the Rev. Stats. c. 107, § 29, to enter such special judgment as

¹ 10 Met. 173.

(*f*) This proposition would seem to be founded upon the English doctrine of *tacking*.

justice and equity in each case may require. And it is obviously the policy of the law, and beneficial to all parties, in saving expense, to avoid two suits between the same parties, when one will afford a complete remedy."¹

126. In a suit against a surviving mortgagor and the personal representative of a co-mortgagor, to foreclose, no personal decree can be made against such representative, even so far as to settle the amount due from the estate.²

127. One may hold two mortgages on different estates, to secure one debt, and foreclose one only. Whether this will bar a foreclosure of the other, depends on the value of the property foreclosed. If equal in value to the debt, this will be the effect.³

128. Joint bond from A. and B., secured by mortgage of A. Afterwards A. gave a bond to B., assuming the former, and indemnifying B. against it. The parties having paid each half of the first bond, B. procured an assignment of it to a third person, for the purpose of obtaining a foreclosure. Held, a bill to foreclose by the assignee could not be maintained.⁴

129. Where a mortgage is made by two tenants in common, the mortgagee has a right to foreclose the whole estate; and cannot be compelled in equity to receive from one his share of the debt, and proceed against the other for the balance, though a bond of indemnity be tendered him.⁵

130. Where the rights and interests of some of the defendants in a bill of foreclosure were distinct from each other, because they had subsequent mortgages upon distinct parcels of the land mortgaged to the plaintiffs; yet, as the defendants were all interested in the plaintiffs' prior right, and neither could redeem his own till that right was satisfied; held, a decree, that each should pay the plaintiffs' debt, with interest and costs, by a certain time after that limited for the mortgagors, was correct.⁶

¹ *Pierce v. Balkam*, 2 Cush. 374.

² *Rhodes v. Evans*, 1 Clark, 168.

³ *Burpee v. Parker*, 24 Verm. 567.

⁴ *Sturges v. Alyea*, 2 Halst. Ch. 183.

⁵ *Frost v. Frost*, 3 Sandf. Ch. 188.

⁶ *Mix v. Hotchkiss* 14 Conn. 32.

131. The following decisions illustrate the principle, that the judgment in a suit upon a mortgage, even at law, will be so moulded as to meet the substantial justice of the case, without regard to nice and technical rules.

132. In a bill for redemption of a mortgage, the Court may incidentally relieve a party from forfeiture of the estate for breach of condition in his deed.¹

133. In the case of *Sargent v. McFarland*,² Ira and James McFarland, two tenants in common, made a mortgage to secure a joint and several bond, which was assigned to the plaintiff; and afterwards one of them mortgaged an undivided half of the same land to Daniel McFarland. The second mortgagee assigned his mortgage to the first, who took possession thereupon for breach of condition, and then brings this action against Ira for an undivided half of the land, upon the first mortgage. It was held, that, if the suit had been brought against both mortgagors for the whole land, the defendant might have redeemed by paying the whole debt, and would thus have become an equitable assignee of the mortgage, both as against James, for the purpose of contribution, and against any subsequent mortgagee; otherwise, by a second mortgage from James, the defendant might be deprived of all security; that the Court would not compel the defendant to adopt this course, and then bring an action or bill against the plaintiff, claiming under the second mortgage, to enforce his rights under the first, more especially as the plaintiff had entered to foreclose for a debt voluntarily created after the first mortgage; but would exercise its equity jurisdiction, under the statute providing that judgment be rendered in such case for so much as is due, according to equity and good conscience, and render judgment only for the amount equitably due in relation to the land, which was *one moiety* of the debt, a moiety of the land having been taken by the plaintiff to secure another debt from James alone. Judgment was accordingly rendered, that the plain-

¹ *Hancock v. Carlton*, 6 Gray, 39.

² 8 Pick. 500.

tiff have possession, unless the defendant, within two months, pay half the money due on the bond. The objection, that such judgment would bar a suit against the defendant upon the bond for the balance due, was answered by the fact, that the facts on which the judgment was founded were specially set forth. If James had been a mere surety for the defendant, the whole amount being equitably due from the latter, a different rule would be adopted.

134. A mortgagee, whose mental faculties were impaired, burned the mortgage and the title-documents, some of which were originals, others attested copies. At his request, the mortgagor executed a deed, reciting the mortgage from a draft of it, and the loss or destruction of the original, and acknowledging the recital to correspond with the original. The executors of the mortgagee file a bill for foreclosure, stating these facts, which were found by the Master to be true. Held, the plaintiffs should procure fresh attested and office-copies, and also make compensation for the damage done to the estate, the amount to be settled by the Master, and deducted from the debt.¹

135. Mortgage, with a delivery of the title-deeds, some of which the mortgagee lost. The mortgagor gave notice of his intention to pay the mortgage at the end of six months, but did not pay it till after that time, in consequence of the mortgagee's failing to indemnify him for the loss of the deeds. The mortgagee brings ejectment, and the mortgagor a bill to redeem. Held, a redemption should be allowed, and a certain sum, paid by the mortgagor for interest after the six months, repaid to him; that the mortgagee should furnish a satisfactory indemnity, and pay the costs of both suits.²

136. With regard to the sum for which a judgment or decree shall be rendered, it is said, whether the bill be filed by the mortgagor for redemption, or the mortgagee for foreclosure, the order of the Court is, that it be referred to the

¹ *Hornby v. Matcham*, 16 Sim. 325.

² *Lord Middleton v. Eliot*, 15 Sim. 531.

Master, to take an account of principal, interest, and costs due the mortgagee. The usual decree is, that the Master take an account of what the mortgagee has received, or might have received but for his own default; but any sums received subsequent to the decree must be brought into the account, though the decree does not, in terms, extend to future rents.¹ There must be a special order for an allowance for improvements.²

137. Where the decree directed an account of what was due the defendant (the devisee of the mortgagee), and of the rents and profits received by him; it was held, that the Master ought to calculate the amount due to the defendant, without deducting the rents received by the testator.³

138. The amount, for which a conditional judgment shall be rendered, may be determined by the terms of a separate acknowledgment from the mortgagee to the mortgagor.

139. A note and mortgage were given by the tenant to the demandant, as security for the price of such goods as the former might afterwards buy of the latter. Divers lots of goods were subsequently sold, after which the tenant gave the demandant a deed of a portion of the land, with the usual covenants, adding, after the covenant against incumbrances, the words, "except a mortgage" to the demandant. The same day the demandant gave the defendant a writing, agreeing to give up a mortgage "now held by me for \$1,000, without interest from date, as soon as payment is made of two notes for \$408, with interest." The demandant at the time held such notes bearing interest, the amount of which was due for goods previously sold, not reckoning interest upon the items of the account. Held, the demandant should have conditional judgment only for the amount of the notes with interest, the above agreement being an account stated of the sum due on the mortgage, and a waiver of any claim for interest on the account for goods sold.⁴

140. The usual and best method of proceeding, in cases of

¹ Coote, 604.

² *Ib.* 607.

³ *Trulock v. Robey*, 15 Sim. 265.

⁴ *Rice v. Clark*, 10 Met. 500.

foreclosure, is said to be, to appoint a Master to find and report the amount due, and then exceptions may be filed to the report, upon which the judgment of the Chancellor is given; and this may afterwards be assigned as error. It is no error, however, for the Chancellor to make the calculations himself; but when he has done so, a mistake in calculation must be brought to his notice in some form analogous to that of an exception to a Master's report.¹

141. With regard to the delay or indulgence granted to a mortgagor before final judgment against him, it is held that the extension of the time of payment in a suit for foreclosure, termed in equity *an exception*, is a practice not applicable to postponements, after a decree upon a bill *for redemption*.² (See chap. 26, § 14.)

142. The course in equity is stated to be as follows:—In a suit for foreclosure, praying an account and payment by a certain day, the defendant answers, the case is referred to a Master, and a decree is rendered to pay the debt and costs in six months from the report. The Master makes a report, fixing the day of payment, and his report is confirmed. If the defendant makes default, the mortgagee may have an absolute foreclosure.³

143. Where a decree allowed the mortgagor to redeem, on payment of the sum to be reported as due to the mortgagee, within a certain time after confirmation of the Master's report, but did not declare what should be the effect of a failure to redeem, and the amount was not thus paid; held, the construction of the decree was, that the right of redemption should be barred by a failure to pay at the time; but the Court extended the time for thirty days.⁴ (*g*)

¹ *Guy v. Franklin*, 5 Cal. 416.

² *Jenkins v. Eldredge*, 1 W. & Min. 61.

³ *Coote*, 566, 567.

⁴ *Sherwood v. Hooker*, 1 Barb. Ch. 650.

(*g*) Whether a decree of foreclosure is erroneous, because the defendant has not examined, or had notice to examine, the report of the amount due by the clerk, *qu.* *McGowan v. James*, 12 S. & M. 445.

144. As has been already stated, the decree in a suit upon mortgage, in many of the States, is for a *sale* of the property. (*h*) Upon this subject it has been held, that, though a mortgagee is not only a trustee but a surety for the debt, and the mortgaged premises are in a state of ruin and decay, in consequence of storms, and the security thereby impaired and rendered precarious; he cannot, for this reason, have the property sold before the debt is due, or the debtor in default.¹

145. A decree, ordering a commissioner to sell, make the deed, and pay over to the plaintiff what may be due him, is informal.²

146. A decree of foreclosure should fix a reasonable time for payment, in default of which the property is to be sold. The period of one day has been held unreasonable, and the proceedings erroneous.³

147. Where the mortgagee has taken possession of part of the property, under a power authorizing him to take possession upon failure of payment and retain it till payment, and has filed a bill to foreclose the right of redemption in this portion, and for a sale of the rest; a decree will be erroneous unless it give time to the mortgagor to redeem.⁴

148. A decree of foreclosure and sale, upon a mere suggestion that separate portions of the premises are held or claimed

¹ Campbell v. Macomb, 4 Johns. Ch. 534.

² Tooley v. Gridley, 3 Sm. & M. 493.

³ Richardson v. Parrott, 7 B. Mon. 379.

⁴ McIntyre v. Whitfield, 13 Sm. & M. 88.

(*h*) The Indiana statute, requiring the Court to ascertain whether mortgaged premises can be sold in parcels, applies only where there are instalments yet to become due. *Harris v. Makepeace*, 13 Ind. 560.

In Wisconsin, an order that the premises be sold in one lot cannot be disregarded by the sheriff, though the complainant and principal defendant agree otherwise. *Babcock v. Perry*, 8 Wis. 277.

In California, the omission in a judgment for foreclosure of the words "be sold," after the description of the premises, is a mere clerical error not affecting the decree. *Moore v. Semple*, 11 Cal. 360.

by different persons, under subsequent conveyances or mortgages, will, as a matter of course, contain provisions, authorizing the Master to sell in such manner as to protect the equitable rights of the respective defendants. The proper form is, that, if the facts above mentioned appear to the Master, he shall sell the premises in parcels, in the inverse order of their alienation, and according to the equitable rights of the parties. And if one of the grantees is entitled to a way or other easement in the residue of the premises, such residue shall be sold, subject thereto. But the decree should not prejudice or define the existence or extent of such way, without anything to show the grounds of it; and the decree should direct the Master, in his notice of sale, to specify the time and place when and where the several parties interested should attend before him, and be heard as to the order in which the several parcels shall be sold.¹

149. Upon ordering a sale, it is not error that the Master is not required to bring the money into Court.²

150. Where one purchases the land from a mortgagor after a bill of foreclosure taken as confessed against him, the title of such purchaser is subject to the claims of the complainant, and to the admissions of the mortgagor, involved in suffering the bill to be taken as confessed; and such purchaser cannot set up any other defence than the mortgagor might have made, had no sale taken place.³

151. Where lands conveyed to a trustee for the benefit of one person, and other lands conveyed to the same trustee for the benefit of another person, were mortgaged back in one deed for the unpaid portion of the price of both, and the assignee of the mortgagee afterwards released a part of the former lands, and this part was conveyed in fee by the trustee; upon a bill brought by the assignee to foreclose the mortgage, held, so much of the lands conveyed in trust for one *cestui*, as had not been released, were bound for that part

¹ New York, &c., v. Milnor, 1 Barb. Ch. 353.

² Walker v. Hallett, 1 Ala. (N. S.) 379.

³ Watt v. Watt, 2 Barb. Ch. 371.

of the price which remained unpaid, for the lands conveyed in trust for him; and the lands conveyed in trust for the other *cestui* were bound for the unpaid price of those lands; and a decree of sale was made accordingly.¹

152. If premises mortgaged cannot be sold in parcels or divided without injury, the whole may be sold, though the whole debt is not due, and the proceeds applied to pay the interest and costs, and the surplus to the principal. Where a decree is passed for a sale of the whole premises for non-payment of interest, and the mortgagor or purchaser of the equity of redemption, before the day of sale, pays the interest and costs, the sale will be stayed; but the decree of foreclosure will remain as security for payment of future interest, and of the principal, when due.² (i)

153. Where mortgaged property had been sold under a senior execution, held, the purchaser took the estate unincumbered by the mortgage, but the mortgagees might come into court before the sale, and pray that the mortgagor's personal property, described in the bill, should be first applied to the executions; or, after the sale, obtain a distribution of the debtor's estate, so that the mortgaged premises should be exonerated from the execution debt, until the other property should be distributed. If the mortgagee does neither of these things within four years, his rights are barred.³

154. Where land mortgaged was conveyed by the mortgagor to trustees, for benefit of creditors, who sold a part of it, free from incumbrance, to one person, and the rest, subject to payment of the mortgage, to another, who afterwards conveyed a part of his purchase to a third; upon a bill to foreclose against the mortgagor and purchasers, held, the sec-

¹ *Coutant v. Servoss*, 3 Barb. 128.

³ *Gadberry v. McClure*, 4 Strobl.

² *Campbell v. Macomb*, 4 Johns. Ch. Eq. 175.

(i) In Iowa, in a decree of foreclosure, the District Court can order a sale only of the land included in the mortgage. *Wilkerson v. Daniels*, 1 Greene, 179.

ond was not chargeable personally with the costs of the first, on the ground that he was bound in equity to indemnify him against all expenses in defending the suit; but that the first purchaser was entitled to a decree for sale, first of that part of the premises still owned by the second, and, after paying the expenses of sale, the proceeds to be applied to the plaintiff's debts and costs, then the costs of the first purchaser, and lastly the costs of the third purchaser; and if sufficient for that purpose, the part sold to the third purchaser to be sold, and, if there was still a deficiency, the part purchased by the first purchaser to be sold for that purpose.¹

155. If after a decree for foreclosure the mortgagor begin to commit waste, he will be restrained by injunction, though no injunction is prayed by the bill.²

156. In an action for foreclosure, after default, the conditional judgment may be entered, by filing an attested copy of the mortgage.³

157. A judgment, in an action on a mortgage, that the plaintiff recover his debt, interest, and costs, that the mortgage be foreclosed, and the premises be sold by execution, is final; and further proceedings are regarded but as modes of executing the decree.⁴

158. An immaterial variance, in the description, between the judgment and execution, does not affect the foreclosure by entry.⁵

159. Where a decree for foreclosure has been made under a mortgage, which decree is afterwards assigned, and before execution a hostile fraudulent title springs up, and stands in the way of execution; a demurrer to a bill filed by the assignee, setting forth the facts proving fraud, and praying that the decree may be revived, will not be sustained.⁶

160. With regard to *costs* in mortgage suits, (*j*) the gen-

¹ Warren v. Boynton, 2 Barb. 13.

² Goodman v. Kine, 8 Beav. 379.

³ Union, &c. v. Thayer, 14 Mass. 362.

⁴ Hipp v. Huchett, 4 Tex. 20.

⁵ Couch v. Stevens, 37 N. H. 169.

⁶ Cunningham v. Doran, 18 Ill. 385.

(*j*) In the United States, the subject is often regulated by statute. *Supra*,

eral rule is, that on redemption the mortgagee is entitled to full costs, unless deprived of them by his own misconduct or mismanagement, in which case, he sometimes is required to pay costs.¹ Ordinarily, upon a bill to redeem, the complainant does not recover, and most frequently has to pay costs; but where other relief is sought, such as to establish his right to rents and profits, and to have them set off against the amount due on the mortgage, he will be treated with more leniency.² Costs on a bill to redeem are to be awarded against the complainant when the question is as to the amount due.³ The mortgagee pays costs where he brings ejectment against the mortgagor, and a redemption is only impeded by the loss of the title-deeds by the mortgagee. So where a suit to redeem is occasioned by such loss. So where a sale by him under a power is set aside as oppressive. So in case of a tender and refusal,⁴ after six months' notice, in England.⁵ So where the mortgagee sets up an absolute title, or an unconscientious defence, the mortgagors may recover costs.⁶

161. Where, in a bill for foreclosure, only the sum of \$5.57 was shown to be due; held, the plaintiff should either recover no costs, or costs not exceeding that sum.⁷

162. The plaintiffs in a bill to redeem having before commencement of suit tendered the debt and costs; held, no costs should be allowed to either party.⁸

163. The lien of a mortgagee attaches equally for the debt and for the costs necessarily incurred in the enforcement of his rights.⁹

¹ Coote, 408, 455, 456. See *Platt v. Squire*, 5 Cush. 551; *Alexandrie v. Salloy*, 14 La. An. 327; *Langton v. Langton*, 31 Eng. Law & Eq. 402.

² *McConnel v. Holobush*, 11 Ill. 61.

³ *Sessions v. Richmond*, 1 R. I. 298.

⁴ Coote, 455, 456. See *Vanderkemp v. Shelton*, 11 Paige, 28; *Hodges v.*

Croydon, &c., 3 Beav. 86; *Bourne v. Littlefield*, 29 Maine, 306.

⁵ Coote, 603.

⁶ *May v. Eastin*, 2 Port. 414; *Slee v. Manhattan, &c.* 1 Paige, 49.

⁷ *Killan v. Jenkins*, 25 Verm. 643.

⁸ *King v. Duntz*, 11 Barb. 191.

⁹ *Hurd v. Coleman*, 42 Maine, 182.

164. Where a mortgage contained a stipulation for all costs of foreclosure, "including counsel fees not exceeding five per cent. of the amount due"; it was held, that the limitation of five per cent. was intended to apply to counsel fees alone, and the complainant would have the right to recover the whole of his costs by operation of the statute, independent of any stipulation.¹

165. Where the bill to redeem was brought against the representatives of the deceased mortgagee, it was held, that the plaintiff should not be required to pay costs, he having offered before commencement of suit to pay all that was equitably due, and the Court being of opinion that the litigation was wholly caused by the irregular conduct of the deceased in taking an absolute, instead of a conditional, deed.²

166. In *Archdeacon v. Bowes*,³ Alexander, Lord Chief Baron, says: — "It is contended, that it is a universal rule, that wherever a mortgagee is a party to a suit, he must have his costs, inasmuch as the object of his security is to give him his principal and interest, and all costs incurred in getting back his money: Now I do not think that that is a universal rule. Lord Eldon, in *Detillin v. Gale*,⁴ states it only as a general rule. Lord Eldon there says, 'It is said, because he is a mortgagee, he is to have his costs. That is not of necessity. *Primâ facie* he is to have them certainly. The owner coming to deliver the estate from that incumbrance he himself put upon it, the person having that pledge is not to be put to expense with regard to that; and so long as he acts reasonably as mortgagee, to that extent he ought to be indemnified.' I read this only for the purpose of showing that there is nothing in the case to prevent the Court looking at the question of costs, as between mortgagor and mortgagee."

167. The costs of a prior suit upon the note may be in-

¹ *Gronfier v. Minturn*, 5 Cal. 492.

² *Van Buren v. Olmstead*, 5 Paige, 9.

³ McClell. 167.

⁴ 7 Ves. 583.

cluded as part of the mortgage debt, in a subsequent suit for foreclosure.¹

168. The costs and expenses of a foreclosure suit and sale should be deducted from the proceeds. But in case of an unfounded defence and consequent delay, the defendant should be personally charged with them.²

168 *a*. A junior mortgagee, redeeming from a foreclosure sale under a decree on a prior mortgage, must pay the costs of the foreclosure suit, though not a party.³

169. Where a bill of foreclosure was filed against one, to whom the mortgagor had devised the estate, but who did not accept the devise, nor take or claim any benefit under the will; upon putting in a common disclaimer, the defendant was held entitled to costs.⁴

170. Where the defendant, in a suit for foreclosure, has tendered the sum due after the filing of the bill; the plaintiff recovers costs only up to the time of such tender.⁵

171. Where a prior incumbrancer is obliged to appear in a foreclosure suit, to protect his rights, his necessary costs shall be first paid from the proceeds of sale.⁶

172. In Massachusetts it was held, that under St. 1798, c. 77, the Court might at its discretion award costs to either party, as equity required; and where the defendant failed in his defence, having attempted to deprive the plaintiff of his right to redeem by objections, some of which were groundless and unreasonable, and the plaintiff was also in fault, having claimed to have the mortgage discharged when only a part of the debt had become due and payable; neither party was allowed costs.⁷

173. If a first mortgagee refuse to accept payment from a second mortgagee, although without the concurrence of the mortgagor; he will not recover costs in a suit for foreclo-

¹ Pettibone v. Stevens, 15 Conn. 19.

² Jones v. Phelps, 2 Barb. Ch. 440.

See Lewis v. De Forest, 20 Conn. 427.

³ Gage v. Brewster, 30 Barb. 387.

⁴ Higgins v. Frankis, 1 Eng. Rep. 71.

See Hurst v. Hurst, 19 Eng. Law & Eq. 385.

⁵ Williams v. Sorrell, 4 Ves. Jr. 389.

⁶ Mayer v. Salisbury, 1 Barb. Ch. 546.

⁷ Saunders v. Frost, 5 Pick. 260.

sure. Perhaps, in strictness, he is not bound to assign the debt.¹

174. Where the debt is paid after commencement of suit, the plaintiff may discontinue without costs to subsequent incumbrancers, who have appeared, or to the mortgagor.²

¹ *Smith v. Green*, 1 Coll. 555.

² *Gallagher v. Egan*, 2 Sandf. 742.

CHAPTER XXXIII.

FORECLOSURE SALE.

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|--|--|
| 1. Sale of the mortgaged premises under a decree of foreclosure; forms of proceeding. 2. Purchase by the mortgagee himself. 8 <i>a.</i> Necessity and effect of the Master's report. | 10 <i>a.</i> Order of sale of different premises. 11. Distribution of proceeds. 31. Opening of a foreclosure. 62. Miscellaneous points of practice. |
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1. WITH regard to *the forms of sale*, in foreclosure suits, and the minute points of practice connected therewith, there is of course much diversity in the different States. (*a*) A few prominent and somewhat miscellaneous points only need be referred to.

1 *a.* Equity has power, upon the foreclosure of a mortgage, to order a sale *on credit*.¹ It is held that this cannot be done

¹ Lowndes *v.* Chisholm, 2 McC. Ch. 455.

(*a*) As to the effect of a sale upon subsequent titles, see *King v. McCully*, 38 Penn. 76. A sheriff's sale under a decree of foreclosure is no evidence of eviction, till followed by a deed, or a suit for possession. *Reasoner v. Edmundson*, 5 Ind. 393. In New York no title passes, nor can ejectment be maintained, till the affidavits are recorded. *Bryan v. Butts*, 27 Barb. 503.

A mortgage being indivisible and only accessory to the debt, a decree cannot properly be rendered for the sale of the property mortgaged in an action *via ordinaria*, without parties before the Court against whom a judgment may be rendered for the whole debt. *Salory v. Chexnaidre*, 14 La. An. 567.

It is no objection to a judgment for the sale of mortgaged premises, that it does not order the sale of land embraced in the mortgage to which the defendant had no title. *Castro v. Illies*, 22 Tex. 479. See *Lawler v. Claffin*, 22 How. U. S. 23.

without consent ; but that the Master may, upon application by the plaintiff, sell on credit for the amount due on the mortgage, and, as to the residue, for cash.¹

1 *b*. A sale will be *postponed* for any immediate or impending calamity, at the place where the property is situated, by which civil business will be suspended. But *war* does not come under this head.² So, where a settlement is proposed by the mortgagee, a sale may be postponed for six weeks, the delay being mutually beneficial.³

1 *c*. Where a sale is decreed, the writ of possession may be issued, without notice of the application to the opposite party ; but the discretion of the Court is to be governed by the condition of the crops.⁴

1 *d*. Where property was sold under a decree of foreclosure ; held, the defendant was not entitled to point out particular property, as the execution was only against the property mortgaged.⁵

2. It is a practice not uncommon, for the mortgagee himself to become the purchaser, in order that he may thereby gain an absolute title. Upon this subject it has been held, that the mortgagee may himself purchase the premises ; and the smallness of the price, compared with the real value, will not furnish sufficient ground to set aside the sale ; though in some instances the sale is held less conclusive than in ordinary cases, for this cause.⁶ So a valid agreement may be made, that the lawyer at a foreclosure sale shall hold the property in trust for the mortgagee.⁷ And only the mortgagor himself can take the objection that the mortgagee is the purchaser.⁸

2 *a*. On the other hand, where a foreclosure was had for the benefit of an assignee, and he bid in the property, the sale was held void.⁹ So a decree was opened after a sale

¹ Sedgwick v. Fish, Hopk. 594.

² Aston v. Romayne, 1 Johns. Ch. 310.

³ Ibid.

⁴ Ballinger v. Waller, 9 B. Mon. 67.

⁵ Flemming v. Powell, 2 Tex. 225.

⁶ Mott v. Walkley, 3 Edw. 590 ;
Tripp v. Cook, 26 Wend. 146. See

Van Hook v. Throckmorton, 8 Paige, 33 ; Waller v. Harris, 20 Wend. 555 ;
Goff v. Robins, 33 Miss. 153.

⁷ Lockwood v. Mitchell, 7 Ohio, N. S. 387.

⁸ Edmondson v. Welsh, 27 Ala. 578.

⁹ Cameron v. Irwin, 5 Hill, 272 ; Torrey v. Bank, &c., 9 Paige, 649.

by the Master, where the complainant purchased, and had not sold or mortgaged.¹

2 *b.* If a mortgagee purchase at a void execution sale, and enter satisfaction on the mortgage; a decree in a suit by the debtor, setting aside the sale, will also order payment of the mortgage debt under penalty of foreclosure.²

2 *c.* A mortgagee may claim interest till the sale is confirmed by the Court, though he has himself purchased the property.³

2 *d.* Where a mortgagee purchased under a decree of foreclosure, being at the same time a trustee of the equity of redemption, and afterwards made a resale of the premises at a large advance, and credited the trust estate with the amount; he was not allowed afterwards to claim the surplus proceeds, on the ground that the resale was upon his own account.⁴

2 *e.* Where the decree expressly authorizes any party to the suit to purchase the property; this merely dispenses with the operation of the technical rule against such purchase, but does not authorize a purchase or holding contrary to equity.⁵

2 *f.* When a mortgagee buys a portion of the land, he will not be allowed the full price out of the surplus arising from a sale in foreclosure, but only the amount which such portion sold for, in proportion to the other land.⁶

2 *g.* A., in 1829, conveyed to B. a part of certain land, which was previously subject to a mortgage to C., and C., on the same day, released this part to B. The next day, C. assigned the mortgage to D., who had notice of the release. On a bill filed by D., in 1844, a decree was made for the sale of all the land described in the mortgage. B. was made a party to the bill, but did not appear. At the sheriff's sale, all the land described in the mortgage was set up and struck off to D., and the sheriff, in pursuance of an arrangement between

¹ *Millspaugh v. McBride*, 7 Paige, 509.

² *Lylstra v. Keith*, 2 Desaus. 140.

³ *M'Lean v. Latayette, &c.*, 4 M'L. 430.

⁴ *Pierson v. Thompson*, 1 Edw. Ch. 212.

⁵ *Couger v. Ring*, 11 Barb. 356.

⁶ *Frost v. Peacock*, 4 Edw. Ch. 678.

D. and E., made the deed to E., who also had notice of the release. E. brought ejectment against B. for the part so conveyed and released to him. On a bill filed by B. against E. stating these facts, a preliminary injunction was awarded.¹

2 *h.* The defendant purchased land, subject to two mortgages, which he agreed to pay, but failed to do so, and suffered the first to be foreclosed, against him and the plaintiff, the second mortgagee himself becoming the purchaser for the amount of the first mortgage. In a suit by the plaintiff to foreclose his mortgage; held, the above proceedings were no bar, but operated to extinguish the first mortgage.²

2 *i.* Where a mortgagee forecloses, purchases the property, and suffers it to remain in the possession of the mortgagor after the sale, such retention of possession is a badge of fraud as against other judgment creditors.³

2 *j.* The assignee of a mortgage, on a sale under a decree of foreclosure, became the highest bidder, but, for a sum of money in hand paid by the assignor, and his promise to pay the residue of the debt for which the assignment was made in a short time, agreed to hold the property as security, and in trust for the assignee. Held, that he should convey to the assignor, on payment of the balance of the debt due and costs of foreclosure and sale, accounting for and deducting not only the actual profits which he had received of the property, but also such as he might have received but for his wilful default, and also the amount of waste and dilapidation committed or suffered by him in the property.⁴

2 *k.* Where a mortgagee purchased under circumstances rendering the purchase inequitable, it was held, that a distinct transaction between the parties, by which the mortgagee had sustained an injury, afforded no ground for refusing a resale.⁵

2 *l.* Where a bill to foreclose a mortgage is filed in the name of A., but in fact for the benefit of B., and A. becomes

¹ *Pierson v. Ryerson*, 1 Halst. Ch. 196.

² *Hilton v. Bissell*, 1 Sandf. Ch. 407.

³ *Williams v. Kelsey*, 6 Geo. 365.

⁴ *Sonthgate v. Taylor*, 5 Munf. 420.

⁵ *Tripp v. Cook*, 26 Wend. 143.

the purchaser of the mortgaged property, and refuses to pay the purchase-money; B. may in her own name move for an attachment to compel payment of the purchase-money.¹

2 *m.* In such case, where it appeared that the refusal to pay the purchase-money was because of a prior foreclosure of the same mortgage by A., it was held that the attachment ought not to have issued.² (b)

3. If the purchase by the mortgagee is not *bonâ fide*, he will hold the property only as security.³

4. Where a decree of foreclosure was obtained by fraud, the debt having been previously satisfied, and the mortgagee himself purchased a part of the land; he was ordered to release it to the owner of the equity, and account for the rents and profits, and for the sums paid by innocent purchasers at the sale.⁴

5. Where a bank is bound to pay off a mortgage, so as to relieve the property of a third person from a foreclosure sale, the cashier, being the agent of the bank, cannot purchase the property on his own account, and thus render the bank liable to indemnify such person for the loss of his property.⁵

6. In New York, if upon a statute foreclosure the mortgagee purchase, the foreclosure is not complete without *the affidavits*, which stand in place of a conveyance; and such

¹ *Lyon v. Elliott*, 3 Ala. 654.

² *Ibid.*

³ *Lyon v. Jones*, 6 Humph. 533. See *Middlesex Bank v. Minot*, 4 Met. 325.

⁴ *Loomer v. Wheelwright*, 3 Sandf. Ch. 135.

⁵ *Torrey v. Bank, &c.*, 9 Paige, 650.

(b) In analogy with the doctrine in the text, where, at a sheriff's sale of the property of an insolvent corporation, on execution, competition was prevented, by an agreement between a mortgagee of a part of the property and a portion of the creditors, that A., one of the number, should bid off the property, for the purpose of securing their debts, and the property was consequently sold at a sacrifice, and bought by A.; it was held, that the sale was unlawful, and that A. was a trustee of the property for the company and its creditors. *Hamburg, &c. v. Edsall*, 1 Halst. Ch. 249; *Edsall v. Hamburg, &c.*, 1 Ib. 658.

affidavits are conclusive, and cannot be controlled by parol evidence.¹ Thus, where the title, set up by a plaintiff in ejectment, is founded on the foreclosure of a mortgage, by advertisement and sale under the statute, and he is the mortgagee and purchaser, and receives no conveyance from the mortgagor; he must show that all the requisitions of the statute are complied with, and especially that the affidavits of the publication, and of posting and service of the notices of sale, &c., are made and completed before the commencement of the action. Until they are made, no title vests in the purchaser.²

7. Ejectment by one claiming under the mortgagor against one claiming under the mortgagee, who purchased upon a statute foreclosure. The auctioneer's affidavit stated a sale of only a part of the mortgaged premises. Held, the defendant should not be permitted to prove a mistake in the affidavit in this respect; though it might be otherwise, had a stranger purchased under the foreclosure.³

8. It has been held in Alabama, that the mortgagee may purchase the estate, where the sale is made upon petition of the mortgagor's personal representative.⁴

8 *a*. With regard to the preliminary or interlocutory action of officers of the Court, prior to any final judgment, it is held, that, where a mortgage is established in a suit to foreclose, by default or otherwise, a reference, to ascertain the amount due, shall be ordered, of course; and any objections to the enforcement of the mortgage must be taken by exception to the report.⁵

8 *b*. On a bill to foreclose a mortgage, the order, referring the bill to a Master to report an account, stated that "the mortgage and notes" were "produced and proved to the Court," and the Master reported, "that, on comparing the mortgage bill and notes, he finds due the complainant two

¹ *Arnot v. M'Clure*, 4 Denio, 41.

² *Layman v. Whiting*, 20 Barb. 559.

³ *Arnot v. M'Clure*, 4 Denio, 41.

⁴ *Duval v. P. & M. Bank*, 10 Ala. 636.

⁵ *Blake v. Nelson*, 1 Dev. Ch. 418; *Millford v. Williams*, 4 Halst. Ch. 536; *Jewett v. Guild*, 42 Maine, 246.

notes," &c. Held, that these recitals, with the possession of the mortgage and notes by the complainant, were sufficient to show that the testator was the proprietor of the notes by assignment, especially after a decree *pro confesso*.¹

8 c. A decree for a foreclosure and sale of the mortgaged premises is not erroneous, because it does not expressly require the Master to report his proceedings to the Court, but directs him to make a deed to the purchaser.²

8 d. Where, on a petition for surplus money accruing upon a sale under a decree of foreclosure, a reference is made to a Master, his report, and a final order of the Court, must be made, before the money can be paid over.³

8 e. In a suit to foreclose a mortgage, the plaintiff was allowed, — in the order of reference to a Master, as against absent defendants, to take proof of the allegations in the bill, preparatory to a hearing, — to insert a direction to the Master to compute the amount due on the mortgage.⁴

8 f. In New York, sales of mortgaged premises by a Master under a decree of the Court, according to the statute, (Sess. 36, c. 95, § 11,) must be made by the Master personally, or under his immediate direction.⁵

8 g. Where there is an order of reference to a Master to ascertain the amount due on a mortgage, the cause, on the coming in of his report, must be set down for hearing on the requisite notice; and a decree of sale, in such a case, entered immediately on filing the report, was set aside for irregularity.⁶

9. In New York, an order to confirm a Master's report of a sale, under a decree in a foreclosure suit, is not necessary to pass a title. This passes by his deed; and he is authorized to convey, after enrolment of the decree, and before confirmation of the report. The confirmation relates back to the date of the deed.⁷

¹ Cullum v. Batre, 2 Ala. 415.

² Ibid.

³ — v. Allen, 1 Green, Ch.

388.

⁴ Corning v. Baxter, 6 Paige, 178.

⁵ Heyer v. Deaves, 2 Johns. Ch. 154.

⁶ Dean v. Coddington, 2 Johns. Ch. 201.

⁷ Fort v. Burch, 6 Barb. 60.

10. But, in Mississippi, a sale for foreclosure must be confirmed by the Court,¹ unless there be some equivalent act of parties, such as lapse of time.²

10 *a*. With regard to the *mode of selling*, and more particularly the point whether the whole or a part of the property shall be sold; it is held, that it is not, in general, irregular to authorize the Master to sell mortgaged premises "in lots, or in whatever way may best comport with the interest of the defendant," unless infants are interested, in which case it should be referred to him, to report in what manner the premises can best be sold.³ The Master should be governed by the instructions of the owner.⁴ He may sell a sufficient portion without special order.⁵ A decree which directs a sale of the whole will be held correct, where it does not appear that the premises were worth more than the amount of the debt.⁶

10 *b*. Where only part of the money secured by a mortgage is due, and the bill is taken *pro confesso*, the plaintiff is entitled to have a clause inserted in the common order of reference, of course, directing the Master to ascertain whether the premises can be sold in parcels, without prejudice to the interest of the parties.⁷

10 *c*. On a bill for foreclosure and sale of mortgaged premises for non-payment of interest, the whole or part of the premises will be sold, as the Court may deem just and necessary, on a special report of a Master as to the situation of the premises, and a further order from time to time may be obtained, as the interest or principal becomes due, on the Master's report of the amount.⁸

10 *d*. And where the mortgage was to secure several bonds, some of which were not due at the time of the decree, but

¹ *Sanders v. Dowell*, 7 Sm. & M. 640; *Lacoss v. Keegan*, 2 Cart. 406; 206. See *Anderson v. Davies*, 6 Munf. Wiley v. Angel, 1 Clark, 217.

² *Gowan v. Jones*, 10 Sm. & M. 164; *Tooley v. Gridley*, 3 Sm. & M. 413. ⁴ *Brown v. Frost*, 1 Hoffm. Ch. 41.

⁵ 1 Clark, 217. ⁶ *Phillips v. Ricards*, 3 Ind. 401.

⁷ *Everitt v. Huffman*, 1 Paige, 648. ⁸ *Brinckerhoff v. Thallhimer*, 2 Johns Ch. 486; *Ellis v. Craig*, 7 Johns. Ch. 7.

the payment of the second would become due before the time of the sale, the payment of that was included in the order for sale.¹

10 *e*. The provision of the New York Revised Statutes, (2 R. S. 193,) directing a sale of so much only of mortgaged premises, where they can be sold in parcels without injury, as will pay the amount due, with costs, is peremptory upon the Court, or, at least, cannot be departed from, except where the plaintiff has some equitable claim upon the rents and profits of the premises, which will accrue before the debt becomes payable.²

10 *f*. Where there are infant defendants to a bill to foreclose, it should be referred to a Master to report, whether it will be for their interest to sell the whole mortgaged premises together or in parcels; and if in parcels, what parcels, and which it will be for their interest to sell first. And the substance of the evidence bearing upon this point should be reported.³

10 *g*. A mortgagee agreed with a third person, with the consent of the mortgagor, to sell the mortgaged premises, and the mortgage was to be used to perfect the title; and the premises were afterwards purchased by such third person, under a foreclosure. On a subsequent application by the mortgagor for a resale, on the ground that a clause in the decree, directing the premises to be sold in parcels, had been erased before signature, and that a portion of the premises would have sold for enough to pay the debt, a resale was denied.⁴

10 *h*. In Illinois, where a mortgage covers several tracts of land, which are decreed to be sold to satisfy the mortgage debt, the commissioner making the sale should sell the tracts separately, and stop the sale when sufficient has been sold to pay the debt; and if he does not, but sells all of them together, the Court may set the sale aside, on the coming in of the report.⁵

¹ Lyman *v.* Sale, 2 Johns. Ch. 487.

² Bank, &c. *v.* Arnold, 5 Paige, 38.

³ Walker *v.* Bank, &c. 6 Ala. 452.

⁴ Wiley *v.* Angel, 1 Clark, 217.

⁵ Waldo *v.* Williams, 2 Scam. 470.

10 *i*. The report of a Master, "that it would be for the interest of the defendants to sell the estate in separate lots, if the premises can be conveniently divided," is not sufficiently definite to be the foundation of a decree for sale of the property. The report should state, whether the property is divisible, which part it was for the interest of the defendants to have sold, and the evidence upon which the report is founded.¹

10 *j*. So a decree, which leaves it in the discretion of the Master to sell the whole or a part of the property, is erroneous.²

10 *k*. But the Master is not bound to divide land mortgaged as an entire parcel into lots, without request of the parties.³

10 *l*. A mortgage given for part of the purchase-money described the land as an entire lot. The mortgagor afterwards laid it out in lots, with streets, to be sold for village purposes; caused a plan to be made of it, and sold some of the lots. A creditor of the mortgagor, having recovered a judgment subsequent to the recording of the mortgage, moved that the mortgagee should, upon foreclosure, sell the land by lots as laid out. Held, such motion should not be allowed absolutely and as of right; nor as a favor and upon terms, where the mortgagee had offered thus to sell, upon receiving security for any loss thereby caused to the amount of one third of the debt.⁴

10 *m*. The sheriff, on a foreclosure sale, has no authority to reserve the way-going crops. Though he makes such reservation at the sale, yet, if no clause to that effect is contained in his deed, it will pass both the land and the crop upon it.⁵

11. With regard to *the application of the proceeds of sale*: where there are several mortgage notes falling due at different times, and a bill to foreclose is filed after all are due,

¹ Walker v. Hallett, 1 Ala. (N. S.) 379.

² Ibid.

³ Woodhull v. Osborne, 2 Edw. Ch. 615.

⁴ Griswold v. Fowler, 24 Barb. 135.

⁵ Howell v. Schenck, 4 Zab. 89.

the proceeds of sale will be applied to all *pro ratâ*; although the one falling due first is secured by an accommodation indorser.¹

11 *a*. Where two notes, secured by mortgage, are assigned to different persons, as security for advances made to the mortgagee, one note separately from the mortgage and the other with the mortgage; both assignees are equally entitled to the benefit of the mortgage security to the extent of their debt; and, if the proceeds of sale under the mortgage will not satisfy the mortgage debt in full, yet the assignees are entitled to full payment for their advances if the proceeds are sufficient, and the assignor cannot come in for a dividend in the proceeds, by virtue of any interest in the mortgage, on account of the excess of the mortgage security over the advances made.²

11 *b*. There shall be an equal distribution between the mortgagee, who retained one note, and the assignee of the other notes and of the mortgage.³

11 *c*. In Pennsylvania, where a sheriff's return, under the act of April 20, 1846, was in favor of the holder of a mortgage for the purchase-money, and the sale was on one of the mortgage notes; held, the mortgagee was entitled to the money, though the other mortgage notes were not due at the time of sale.⁴

11 *d*. Though, where a mortgage is made to secure several notes, the proceeds of sale will be applied to all *pro ratâ*; a decree founded upon the sufficiency of the property to pay the whole mortgage debt, the bill being filed by the holder of one of the notes, will not be set aside upon a mere suggestion of mistake in this respect.⁵

12. Where an agent, with the assent of his principal, included in a mortgage executed by a third person to the principal, upon the sale of land, a debt due himself, it was

¹ Parker v. Mercer, 6 How. (Miss.) 320. See Neptune, &c. v. Dorsey, 3 Md. Ch. 334; Stewart v. Glenn, 3 Md. 323; Com. v. Wilson, 34 Penn. 63; Hynes v. Morin, 12 La. Ann. 742.

² Waterman v. Hunt, 2 R. I. 298.

³ Bushfield v. Meyer, 10 Ohio St. 334.

⁴ Larimer's, &c., 22 Penn. 41.

⁵ Ferry v. Woods, 6 Sm. & M. 139.

held, that the debt due the principal must be first paid out of the mortgage, in the absence of any agreement to the contrary.¹

13. A. gave a mortgage to his co-surety, B., to indemnify him against his liability. Held, that a court of equity might, although the mortgage was absolute on its face, inquire into the purpose for which it was given, and apply it to that use, and might order the mortgage to be cancelled, or the mortgaged premises to be sold, and the proceeds applied towards payment of the judgments against the principal and sureties.²

13 *a*. Premises sold under a mortgage were represented as incumbered, but were really subject to lien for a tax, and the purchaser refused to take them. Upon petition of the mortgagee, the Court ordered the Master to satisfy the lien from the proceeds.³

14. Where land is conveyed with covenants against all incumbrances, and the vendor takes a mortgage for the purchase-money, if there be a prior mortgage on the premises, a decree of foreclosure of the vendor's mortgage will not be made, until he has paid off the prior mortgage; or a sale will be decreed, the proceeds to be applied first to the satisfaction of the prior mortgage, and the amount so applied to be deducted from the amount of the vendor's debt.⁴

15. A sale of mortgaged property after foreclosure, under a common-law judgment in favor of other creditors, disposes only of the equity of redemption, and, therefore, the mortgagee cannot claim the proceeds of such sale, though his mortgage be older than the judgment.⁵

16. Where, after the death of a mortgagor, his equity of redemption is foreclosed, and the land is sold in the foreclosure suit, by which the equity of redemption is converted into a surplus of the proceeds of sale, it does not thereby

¹ *Phillips v. Belden*, 2 Edw. Ch. 1.

² *United States v. Sturges*, Paine, 525.

³ *Lawrence v. Carnell*, 4 Johns. Ch. 512.

⁴ *Van Riper v. Williams*, 1 Green, Ch. 407.

⁵ *Howard v. Jones*, 2 Geo. Decis.

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become personal property to which the administrator is entitled.¹

17. Upon a statute foreclosure, the mortgagee is entitled to sell the premises, discharged of the lien of an instalment not yet due, and to retain the amount of the instalment out of the surplus proceeds.²

18. Where a deed is made, but not recorded, and the grantor is permitted to remain in possession of the land, and exercise all the rights of ownership, the grantee has no right to interfere with those who have in good faith taken a subsequent mortgage or deed from the grantor; and, if a mortgage so taken is recorded before such deed, the mortgagee is entitled to a priority in the disposition of the surplus arising from a sale in foreclosure.³

19. All debts secured by mortgage and due at the date of the decree of foreclosure, unless the mortgage give a preference to some of them, or unless the mortgagee, in assigning some of them, designed to create such preference, should be paid *pro ratâ*, if the fund is insufficient to pay the whole, whether as between the surety of the mortgagor and mortgagee, or different assignees of the latter.⁴

20. A mortgagee is not liable to other incumbrancers, for the application of a surplus remaining after a sale, over and above his debt, without actual notice thereof.⁵

20 *a*. On a bill to foreclose a mortgage, to which junior incumbrancers are made parties, the Court should decree that the balance of the money arising from the sale, after paying the mortgage debt, should be brought into court, to be paid over to the parties according to their respective equities. It is doubted whether a decree, imperfect in this respect, would be reversible on appeal.⁶

20 *b*. The Master may be ordered to inquire into the

¹ Cox v. McBurney, 2 Sandf. 561.

² Cox v. Wheeler, 7 Paige, 248.

³ Frost v. Peacock, 4 Edw. Ch. 678.

⁴ Bank, &c. v. Tarleton, 23 Miss.

173; Pugh v. Holt, 27 Ib. 461.

⁵ McLean v. Lafayette, &c. 4 McL. 430.

⁶ Clark v. Carnall, 18 Ark. 209.

amount due to a subsequent mortgagee, and to make sale of enough to pay it.¹

20 *c.* Subsequent (mechanics') liens were ordered to be satisfied by the sale of the property mortgaged, though no judgment had been recovered upon them, and though property had been sold to the amount of the mortgage.²

21. Where property mortgaged is converted into money, the rights of the mortgagee are not changed, and the Court will order the money to be applied according to the previous rights of the parties.³

22. Where, in a foreclosure suit, the fund has been paid out on an order regularly obtained, a prior incumbrancer cannot obtain relief upon a summary application.⁴

23. Where successive mortgagees bring separate suits for a sale, which is made under the former mortgage, the latter may claim the surplus proceeds.⁵

24. Where there are conflicting claims of junior judgment creditors to the surplus proceeds of sale, they should apply to the Court, before the sale, to order such a sale, as will enable them to settle their respective rights upon the reference.⁶

25. Upon reference to a Master, to ascertain who are entitled to the surplus money brought into court, the report should show a due summons of all parties entitled to notice; also what parties attended; and, if they did not assent to the report, it must be filed, and the usual order entered to confirm it, before an application for payment of the money according to the report.⁷

26. Such report should state the amount of the surplus, and, if the party obtaining the reference is not entitled to the whole, the report should show who is entitled to the residue; that the whole fund may be disposed of, on the coming in of the report.⁸

26 *a.* Though a mortgagor in possession is the legal

¹ *Beekman v. Gibbs*, 8 Paige, 411.

² *Livingston v. Mildrum*, 19 N. Y., (5 Smith), 440.

³ *Astor v. Miller*, 2 Paige, 68; *Brown v. Stewart*, 1 Md. Ch. 87.

⁴ *Burchard v. Phillips*, 11 Paige, 66.

⁵ *Lee v. Boteler*, 12 Gill & J. 323.

⁶ *Snyder v. Stafford*, 11 Paige, 11.

⁷ *Franklin v. Van Cott*, 11 Paige, 129.

⁸ *Ibid.*

owner, and, on a sale of the premises under a prior incumbrance, may assign the surplus, after satisfying the incumbrance, to the purchaser, in satisfaction of a preëxisting debt, such assignment will be subject to the lien of the mortgage, which will continue upon the land if such surplus is not paid.¹

27. The complainant in a suit for foreclosure, and the purchaser at the Master's sale, are bound to notice the equitable interest of one who was in possession at the execution of the mortgage, and continues so to the time of sale, in a building erected by him upon the premises, for which he has advanced money under an agreement with the owner; and the sale will be presumed to have been made subject to such equitable interest. Hence, the party in question will have no claim upon the surplus proceeds of sale.²

28. The Court cannot order a sale, and also withhold the proceeds from the plaintiff.³

29. Where one claims an equitable lien upon the surplus proceeds of a foreclosure sale, the Court will not settle his title upon petition, if he has failed without excuse to give notice of it to the Master who made the sale, or file it with the clerk in whose office such proceeds were deposited, or to present and establish his claim before the Master, in case an order of reference had been entered upon the application of some other claimant, before he was aware of his rights.⁴

30. A sale is void, unless the purchaser complies with the terms.⁵ But a purchaser's title cannot be impeached collaterally for irregularity.⁶

31. Where a sale is set aside on account of the constructive fraud of the purchaser, both he and the mortgagor are entitled to be put in the same situation they were in before the purchase.⁷

31 *a*. Equity is ready to receive the excuses of the mort-

¹ *Bartlett v. Gale*, 4 Paige, 503.

² *De Ruyter v. Trustees, &c.* 2 Barb.

Ch. 555.

³ *Harrison v. McMenomy*, 2 Edw.

h. 251.

⁴ *De Ruyter v. Trustees, &c.* 2 Barb.

Ch. 555. See *Hatch v. Gavza*, 7 Tex. 60.

⁵ *Washburn v. Green*, 13 La. Ann.

332.

⁶ *Nagle v. Macy*, 9 Cal. 426.

⁷ *Trotter v. White*, 26 Miss. 88.

gagor, not only to allow him time to procure the money before foreclosure, but also to open the foreclosure where there was any good reason why it was not resisted.¹ *A sale may be set aside, or the biddings opened*, more especially before confirmation of the sale, for fraud, unfairness, or irregularity; allowing costs and reasonable expenses to the purchaser.² But not for mere inadequacy of price,³ unless there be a *sacrifice*:⁴ nor where the party objecting has been found guilty of negligence.⁵

32. Property worth \$5,000 was offered for sale by a Master, and two bids, of \$2,000 and \$1,800, were made, whereupon the sale was adjourned. Before the time to which it was adjourned, the larger bid was withdrawn, and the property put up again, and bid off for \$560, leaving a judgment unpaid, the creditor being ignorant of the sale. Upon his application, the Court set aside the sale, and ordered a new one.⁶

33. The owner of mortgaged premises being a non-resident of the State, and ignorant of the commencement of a foreclosure suit till after a sale, and his agent, who had charge of the property, having been incapacitated for business by loss of reason, through the visitation of God, and the sale having been consequently made at a great sacrifice; held, it should be set aside, and a resale ordered.⁷ So, where a mere nominal defendant induced the plaintiff to withdraw his consent to a postponement, knowing that the mortgagor was sick, and then himself purchased at an inadequate price.⁸ So, where the sale required immediate full payment in cash.⁹

34. A mortgagee attended at the day and place of sale advertised, and adjourned the sale; but notice of the adjournment was published by mistake for a different and more

¹ *Golden v. Fowler*, 26 Geo. 451.

² *Forman v. Hunt*, 3 Dana, 114.

³ *American, &c. v. Oakley*, 9 Paige, 259; *Henderson v. Lowry*, 5 Yerg. 210; *West v. Davis*, 4 McL. 241; *Strong v. Cotton*, 1 Wis. 471. See *Hill v. Hoover*, 5 Wis. 354.

⁴ *Garrett v. Moss*, 20 Ill. 549.

⁵ *Francis v. Church*, 1 Clark, 475.

⁶ *May v. May*, 11 Paige, 201. See *Collier v. Whipple*, 13 Wend. 224; *Forman v. Hunt*, 3 Dana, 614; *Van Horne v. Everson*, 13 Barb. 526.

⁷ *Thompson v. Mount*, 1 Barb. Ch. 607.

⁸ *Billington v. Forbes*, 10 Paige, 487.

⁹ *Goldsmith v. Osborne*, 1 Edw. Ch. 560.

distant day than the one appointed, and the sale was made on the day appointed. Held, irregular and void.¹

34 *a*. The notice of sale must state the time, which must be in business hours, and fix a convenient or public place, which is easily accessible.²

34 *b*. After the lapse of ten years, a sale was held valid, notwithstanding an irregularity in the advertisement.³

34 *c*. A second confession of a decree of foreclosure may be made under a power of attorney, where the first one made under it has been reversed.⁴

34 *d*. Where a mortgagee untruly said that the sale was postponed, but with no intent to mislead, and consequently the money necessary to pay the debt was not furnished, and the property was sacrificed; upon indemnity to the purchaser, the sale was set aside.⁵

34 *e*. Property was sold under a judgment of foreclosure. Held, the title of the purchaser could not be disputed, upon the ground that the instrument foreclosed was not an ordinary mortgage, and that the judgment was erroneous.⁶

35. In Kentucky, the practice is, to sell only enough land to pay the debt; but a sale of more is not absolutely void, and cannot be set aside by a subsequent mortgagee, after the time within which he might have brought a writ of error to reverse the decree.⁷

36. Where a mortgage is assigned as security for a debt, much less than the value of the property and the mortgage debt; a decree for a sale of the whole, in a suit for foreclosure, is erroneous, the land being susceptible of division into lots. Enough only should be sold to pay debt, interest, and costs.⁸

37. After a judgment, execution, and sale, under a mortgage bond, the Court will not open the account on the mort-

¹ *Miller v. Hull*, 4 Denio, 104.

² *Trustees, &c. v. Snell*, 19 Ill. 136.

³ *Garrett v. Moss*, 20 Ill. 549.

⁴ *Huner v. Doolittle*, 3 Iowa, 76.

⁵ *Strong v. Catton*, 1 Wis. 471.

⁶ *Miles v. Davis*, 19 Mis. 408.

⁷ *Shiveley v. Jones*, 6 B. Mon. 274.
See *Ticknor v. Leavens*, 2 Ala. 149.

⁸ *Delabigarre v. Bush*, 2 Johns. 489.

gage, though there is some irregularity in the accounts, if they appear to be fairly closed.¹

38. In Alabama, where the mortgagee becomes the purchaser, the biddings will be opened, and a resale ordered, before confirmation of the sale, if an advance of not less than 10 per cent. on the former sale is offered, and the money deposited in Court; but a resale will not be ordered where the deposit is less than two hundred dollars.²

39. But where a stranger becomes the purchaser, a release will not be ordered for mere inadequacy of price, however gross, unless there be some unfair practice at the sale, or surprise without fault on the part of those interested, and in no case after confirmation, except for fraud of the purchaser which was not known at the time of the confirmation.³

40. In case of a resale, the purchaser cannot be charged with rent of the premises, unless he has actually received it, and will be entitled to a return of the purchase-money, with interest, all sums laid out in improvements, his costs and expenses, and a liberal allowance for his trouble.⁴

41. A mortgagee, who purchases at a fraudulent sale, made without a decree of foreclosure, cannot claim for improvements.⁵

42. Where the complainant and his solicitor led the defendant in a foreclosure suit, who was liable for the deficiency, if any, to believe that they would not allow the premises to be sold under the decree for less than the debt and costs; and the defendant meant to attend, to bid for his own protection, but unexpectedly and accidentally was prevented, and had used reasonable diligence by writing a letter, which miscarried, and the property sold for one third its value: the Court ordered a resale.⁶

43. A sale and conveyance by a sheriff, purporting to carry the fee, under an order of a law court void for want of jurisdiction, for foreclosure of a mortgage, will carry all the inter-

¹ *Bloodgood v. Zeily*, 2 Caines, Cas. in Lr. 121.

² *Littell v. Zuntz*, 2 Ala. 256.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Gunn v. Brantley*, 21 Ala. 633.

⁶ *Hoppeck v. Conklin*, 4 Sandf. Ch. 582.

est of the mortgagee, though less than a fee; and the sheriff will, for this purpose, be deemed his agent.¹

44. A mortgagee obtained by fraud a decree for a larger sum than was due, and the mortgage was foreclosed, and the mortgagor instituted proceedings to set the decree aside. Held, that a previous tender was not necessary.²

45. Where a mortgagor had been defaulted in a foreclosure suit, though there was a large deficiency after the sale of the mortgaged property, he was not admitted to defend after a decree and enrolment, on the mere allegation that he did not remember that he had been sued with a subpoena.³

46. A default will not be opened in equity for the purpose of letting in an unconscionable or dishonest defence.⁴

47. So, in a bill to foreclose mortgages given by a corporation to secure their bonds, after the corporation have suffered a default, it will not be set aside to enable the defendants to show that they had no power to execute the bonds.⁵

48. After a decree of foreclosure and sale, on a bill taken *pro confesso*, the sale was opened, upon an offer by the defendant to pay 50 per cent. advance upon the sale, the sale not having been confirmed, nor a deed executed, and the plaintiff being himself the purchaser.⁶

48 *a*. A., the purchaser of mortgaged premises at a sale under a decretal order, having failed to complete his purchase, a resale was ordered, the difference in the proceeds of sale, if any, to be paid to A., in case of a surplus, and by him in case of a deficit. There was a deficit, and an action therefor was brought against B., on the ground that he was, in fact, the real purchaser, and A. only his agent. Held, that the action could not be maintained, the order in the foreclosure suit, which required the deficit to be paid by A., being conclusive upon the plaintiff.⁷

¹ Stoney v. Shultz, 1 Hill, Ch. 465.

⁴ King v. Merchants' Exchange Co.

² Lockwood v. Mitchell, 19 Ohio, 2 Sandf. 693.

⁵ Ibid.

³ Yates v. Woodruff, 4 Edw. Ch. 448.

⁶ Lansing v. M'Pherson, 3 Johns. Ch. 424.

⁷ Paine v. Smith, 2 Duer, 298.

49. If an action of ejectment be commenced by a mortgagee, who afterwards files a bill and obtains a decree for foreclosure, the subsequent prosecution of the action and recovery of judgment by the mortgagee will not open the decree, if no execution be collected on such judgment until after the expiration of the decree.¹

50. Equity will open a decree of foreclosure, when the failure of the mortgagor to pay according to the decree was not through his negligence or default, but in consequence of propositions for settlement and payment made by the mortgagee, which were to be carried into effect after the time of payment had expired, and the failure to perform was on the part of the mortgagee.²

51. A misapprehension of the terms of a sale of mortgaged premises, under a decree through which one party is injured, and another who purchases is benefited, may be ground for setting aside the sale.³

52. A sale of the mortgaged premises, on execution issued in proceedings to foreclose the mortgage, was set aside, because a subsequent incumbrancer was prevented by accident from being present at the sale, and the premises sold were for an inadequate price.⁴

53. An original bill in chancery cannot be sustained by a party to a foreclosure suit, to set aside the proceedings upon a Master's sale under the decree, where there was nothing to prevent an application to the Court in that suit for a resale.⁵

54. Upon the foreclosure of a mortgage, the mortgagee, who was also a judgment creditor of the mortgagor to a large amount, purchased the premises for the amount due on his mortgage. A subsequent mortgagee afterwards applied for a resale of the premises, offering a large advance upon the price paid by the prior mortgagee, and alleging his ignorance of a recent rule, under which the premises were

¹ Thomas v. Warner, 15 Verm. 110.

⁴ Howell v. Hester, 3 Green, Ch.

² Smalley v. Hickock, 12 Verm. 153. 266.

³ Hay v. Schooley, 7 Harr. (2d Pt.)

⁵ Brown v. Frost, 10 Paige, 243.

sold, as the cause of his absence from the sale. Held, the sale being fair, and the property of the mortgagor being so situated that the satisfaction of the purchaser's judgment would be difficult, except from the mortgaged premises, that a resale would not be permitted.¹

55. A mortgagee sold a decree of foreclosure, obtained upon the mortgage, to a subsequent incumbrancer, and, upon a sale of the premises, they were purchased by a trustee for the mortgagor, at a price far below their value; but the full, or nearly the full, value of the premises was applied to the payment of the debt due the purchaser of the decree. Held, that a resale of the premises could not be decreed for the benefit of the mortgagee, who had not been defrauded, misled, or surprised, by any act of the parties interested.²

56. It has been held, that a mortgagor must bring a *bill to redeem*, in order to avoid a foreclosure. He cannot have the sale set aside, though the mortgagee has abused the power to sell, and himself become the purchaser.³

57. It is said, "No general rule can, however, be laid down for the opening of a foreclosure; each individual case must rest on its own merits."⁴

58. The account may always be opened for fraud, or the party will be allowed, upon allegation and proof of specific error, to surcharge and falsify. He cannot, however, in the latter case, go into the general account, though fraud will be a sufficient ground to open the whole account; but, if he be at liberty to surcharge and falsify, he is not confined to errors in fact, but may, it is said, take advantage of errors in law.⁵

59. Although a settled account shall not be opened, unless particular errors are pointed out, yet, on a bill filed by a client against his attorney, alleging error generally in a settled account, if the defendant admit the fact, the account will be opened.⁶

60. If a solicitor, holding a mortgage, charges poundage,

¹ *Gardiner v. Schermerhorn*, 1 Clark, 101.

See *Bissell v. Bozman*, 2 Dev. Ch. 160.

² *Farnham v. Colton*, 1 Clark, 35.

⁴ *Coote*, 571.

⁵ *Ib.* 609.

³ *Schwartz v. Sears*, Walk. Ch. 170.

⁶ *Matthews v. Wallwyn*, 4 Ves. 118.

in his account, on the amount of rents received, without informing his client that he has no right to do so, the latter may surcharge and falsify.¹

61. But, if the client has paid his solicitor's bill of costs without pressure or undue influence, in order to have it taxed, he must allege and prove that the charges are so grossly improper as to furnish evidence of fraud.²

61 *a*. In a proceeding to foreclose a mortgage, a rule absolute was entered before the expiration of twelve months from the entry of the rule *nisi*; and the proceeding was instituted against the legal representatives of the mortgagor, and before administration had been granted on his estate. Held, that these irregularities were not sufficient to impeach the title of a *bonâ fide* purchaser under the judgment of foreclosure.³

62. Where, on a sale of mortgaged premises under a decree, the bond is fully paid, the obligor is entitled to have the bond and mortgage delivered up to him to be cancelled. The obligee or purchaser is not entitled to retain them for greater security of his title under the decree, without the obligor's consent. But a third person, who pays off mortgage debts for his own security, may be substituted in place of the obligor, and retain the bond and mortgage.⁴

63. A decree of foreclosure extinguishes the mortgage lien, though merely enrolled and not docketed; and, after satisfaction of the mortgage by a sale of the land, the decree ceases to be a lien thereon.⁵

64. Where the mortgagor is left in possession, under an agreement with the purchaser to redeem, he holds under this contract, not as mortgagor.⁶

65. After foreclosure, the mortgagor is entitled to the rents and profits, until the purchaser becomes entitled to possession.⁷

66. A purchaser at a mortgage sale of land, previously

¹ Langstaffe v. Fenwick, 10 Ves. 405.
See Boudurant v. Taylor, 3 Iowa, 561.

² Horlock v. Smith, 2 My. & Cr. 495.

³ De Lorme v. Pease, 19 Geo. 220.

⁴ Coster, 2 Johns. Ch. 503.

⁵ People v. Beebe, 1 Barb. 379.

⁶ Toll v. Hiller, 11 Paige, 228.

⁷ Astor v. Turner, 11 Paige, 436.

sold on execution against the mortgagor, and of which possession has been delivered by the sheriff, cannot transfer his title so as to authorize his alienee to sue in his own name.¹

67. If the plaintiff does not proceed to a sale with due diligence after the decree, another party to the suit may apply for the management of it. And, if a sale has been ordered, the Court, on application of such party, may order an immediate sale, though the plaintiff has given directions.² (c)

68. The purchaser may be put in possession by a writ of assistance, after the defendant has been shown the Master's deed, and a certified copy of the order confirming the sale.³ But notice of the motion, with the affidavit on which it rests, must first be served upon one who has come into possession since the commencement of suit, not being a party.⁴

69. A vendee of the purchaser will not be aided by the Court in obtaining possession, if injustice is likely to be thereby effected.⁵

70. A decree of sale, in a suit to foreclose a mortgage, does not vest the title in the mortgagee so as to make the mortgagor a stranger to the land; and the representatives of the mortgagee may file a bill against the other parties to the decree, or their representatives or privies, to carry the decree into effect.⁶

71. A person, who purchased after the commencement of a suit to foreclose, at a sale under a judgment against the mortgagor, recovered before that time, is not considered as entering under the mortgagor, pending the suit, within the intent of that part of the decree, which directs those who have entered under a party pending the suit to deliver pos-

¹ Pryor v. Butler, 9 Ala. 418.

² Kelly v. Israel, 11 Paige, 147.

³ Hart v. Lindsay, Walk. Ch. 144.

⁴ Bernhard v. Darrow, Walk. Ch. 519.

⁵ Van Hook v. Throckmorton, 8 Paige, 33.

⁶ Cruger v. Daniel, Riley, Ch. 102.

(c) For the practice in a sale as to costs, see Kelly v. Israel, 11 Paige, 147. Also as to the Master's duty, *Ib.* See, further, Wetmore v. Winans, 8 Paige, 370.

session.¹ But such purchaser, having filed a bill to redeem, was ordered to give up the possession, or give security for the costs, damages, and mesne profits of the suit by him to redeem.²

72. The purchaser of land, under a decree of foreclosure, is entitled to the assistance of the Court in obtaining possession, as against parties to the suit for foreclosure, or persons who have come into possession under them subsequently to the filing of notice of the commencement of the suit.³

73. In case of a decree for the sale of mortgaged premises, on a bill by the mortgagee, if the trustee appointed has died after making the sale, and his bond is lost, creditors entitled to the surplus proceeds cannot sustain a petition against the sureties of the trustee, to have those proceeds paid into court, on the ground of the loss of the bond. Under such circumstances, the sureties and the petitioners are alike strangers to the cause.⁴

74. Where a purchaser, at the time of the purchase, had notice of a prior incumbrance, the Court, under the circumstances, allowed him to redeem from the prior incumbrancer, and refused to limit him to the surplus proceeds of the sale, on a bill to foreclose the prior mortgage.⁵

75. A mortgagor and those claiming in his right may have relief, by the exercise of the summary and inherent powers of a court of equity, or by attachment, against a trustee of that court for the sale of mortgaged premises, to pay the mortgage debt, who retains in his hands surplus funds arising from the sale to which they are entitled; but not against the sureties of such trustee, without positive enactment; and the Maryland act of 1785, c. 72, authorizes no such mode of procedure.⁶

76. Under the act of 1838, a judgment creditor, whose judgment is a lien upon part of a lot of land subject to a

¹ *Fringhuysen v. Colden*, 4 Paige, 201.

= *Hod.*

= *Hod.*

⁴ *Boteler v. Brookes*, 7 Gill & J. 143.

⁵ *Cook v. Mancius*, 5 Johns. Ch. 89.

⁶ *Boteler v. Brookes*, 7 Gill & J. 143.

mortgage, may redeem the premises from a sale under the mortgage.¹

77. Upon a redemption by a mortgagee, of property sold under a prior mortgage, the affidavit of the mortgagor, to the amount due, is sufficient under the statute.²

77 *a.* In case of redemption from the mortgage sale, if the sheriff demands more than is due, it should be paid, under protest.³

78. Upon a decree of sale under a mortgage, and sale to a mortgagee, the mortgagor is not barred from redemption until the purchase is consummated, the deed delivered, and the report confirmed.⁴

78 *a.* In New York, under the act of 1838, an assignee of the equity of redemption, who redeems the premises from a purchaser under a foreclosure of the mortgage, takes the premises relieved of any right of redemption by a prior mortgagee or judgment creditor.⁵

78 *b.* Land subject to a mortgage was mortgaged in trust, and one of the *cestuis que trust*, having purchased the equity of redemption, redeemed the premises from a purchaser under a foreclosure of the prior mortgage. Held, that the situation of the *cestui que trust* was not such as to prevent a redemption by him for his own benefit.⁶

78 *c.* Upon the redemption of mortgaged premises from a sale under a decree of foreclosure, the purchaser is liable to account for the rents of the premises received by him.⁷

79. After foreclosure and sale, a judgment creditor of the mortgagor, whose judgment was docketed subsequently to the mortgage, can redeem only on payment of the sum due on the mortgage, without regard to the price for which the property sold.⁸

80. Where the Court allows mortgagors to redeem, it may properly refuse to open the accounts as settled by a decree

¹ Augur v. Winslow, 1 Clark, 258.

² Ibid.

³ M'Millan v. Richards, 9 Cal. 365.

⁴ Brown v. Frost, 1 Hoffm. Ch. 41.

⁵ Kellogg v. Conner, 10 Paige, 311.

⁶ Ibid.

⁷ Ruckman v. Astor, 3 Edw. Ch. 373.

⁸ Benedict v. Gilman, 4 Paige, 58.

of foreclosure in the inferior court, and decree interest to be paid on such amount.¹

§1. After payment of the purchase-money and delivery of a deed to a purchaser under the decree for foreclosure, the mortgagor, by a tender of the amount bid, acquires no right to redeem the premises.²

§2. After foreclosure by advertisement and sale, but before the right of redemption expires, the mortgagor dies, and his widow sells the land, and the purchaser redeems by payment of the mortgage debt. In an action of ejectment by the mortgagor's heirs; held, the purchaser had a lien for the sum paid by him, with interest, deducting the value of the use of the land over and above the improvements.³

§3. In New York, a purchaser may refuse to complete his purchase, either because the Court had no jurisdiction of the subject-matter, or had acquired none over all the persons interested in the property, or because some statutory provision has been violated or neglected, which renders the proceeding invalid.⁴

§4. Such purchaser cannot object that the decree was erroneous, or that the Court decided wrong upon any point affecting the merits of the controversy.⁵

§5. Nor can he object to the mere form of the proceedings, nor to irregularities in matters of practice.⁶

§6. So where a bill was filed to set aside a mortgage as invalid, the answer insisted on its validity, and prayed for a sale of the lands mortgaged to pay the amount due, and the Court, on hearing the cause on the pleadings and proofs, adjudged the mortgage to be valid, and decreed a sale of the premises and payment of the sum due; it was held, that, whether the decree directing the sale were right or wrong, a purchaser at the sale could not be permitted to object to it.⁷

§7. Held, further, that upon such a bill, answer, and

¹ *United States Bank v. Carroll*, 4 B. Mon. 40.

² *Brown v. Frost*, 10 Paige, 243.

³ *Webb v. Williams*, Walk. Ch. 544.

⁴ *Darvin v. Hatfield*, 4 Sandf. 468.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

issue, the Court had power, and it was the duty of the Court, to make such a decree.¹

88. Where, in a suit to set aside a mortgage, the Court, on sustaining the mortgage, decrees a sale of the premises for its satisfaction, it is no objection to the decree, or to a title under it, that no notice of *lis pendens* was filed pursuant to the statute of May, 1840, it appearing that all the parties interested in the mortgaged premises were parties to the suit.²

89. The statute applies only to bills filed for the purpose of foreclosing mortgages, and is not to be extended by construction to cases not within its object or spirit.³

90. Where a part of mortgaged premises has been aliened by the mortgagor, on a foreclosure and sale, the remainder shall be first sold, and then, if necessary, that which has been aliened; and where the latter is in possession of different vendees, in the inverse order of alienation.⁴ See chap. 13, § 68.

91. But where a part is conveyed by the mortgagor, subject to the payment of the whole mortgage, that part, as between the vendor and vendee, constitutes the primary fund for its payment.⁵

92. Where land was conveyed by the complainant, subject to the payment of a mortgage on other lands, and proceedings were had to foreclose, and the decree became the property of one of the defendants, who also purchased the former lot; held, such purchase operated as a satisfaction of the mortgage, to the value of the lot so purchased.⁶

93. Equity will not grant relief to a party, to remove a supposed cloud upon his title; where the adverse claim is founded upon a deed executed by the attorney-general, upon a sale of land under a statute foreclosure of a mortgage given to the State, which deed, by an erroneous description, included the complainant's land; it being a case where the

¹ *Darvin v. Hatfield*, 4 Sandf. 468.

² *Ibid.*

³ *Ibid.*

⁴ *Mason v. Payne*, Walk. Ch. 459.

⁵ *Ibid.*

⁶ *Ibid.*

attorney-general had no right to sell the complainant's land, and the notice of sale embraced only the land which should have been sold, and where the testimony to prove the error consisted of record evidence, not liable to be lost. But, the grantee in such deed having refused to release, and having asserted title to the complainant's land, and executed a mortgage upon the same to a third person, it was held that he was not entitled to costs on a dismissal of the bill.¹

94. After a statutory foreclosure, a tenant in possession cannot set up as a defence to an action by the purchaser, who bought in good faith, that the mortgagor was *non compos* when he executed the mortgage.²

¹ Cox v. Clift, 3 Barb. 451.

² Ingraham v. Baldwin, 12 Barb. 9.

CHAPTER XXXIV.

FORECLOSURE BY ENTRY WITHOUT SUIT.

- | | |
|--|---|
| 1. <i>Open and peaceable</i> entry. | 22. <i>Waiver</i> of an entry, and the rights thereby acquired. |
| 2. Cases decided upon the mode and effect of such entry. | |

1. It has been already stated, (*supra*, ch. 27,) that in some of the States the mortgagee may foreclose by *an open and peaceable entry*, without legal process, and by remaining in possession for a certain period afterwards. (*a*)

2. The provisions of the Revised Statutes of Massachusetts upon this subject have also been already stated. (*Supra*, ch. 27.) In construction of prior statutes upon the subject, in that State, it has been held,¹ that, if the mortgagee enter before, and continue in possession after, breach of condition; the three years begin to run when he gives notice of his intention to hold for the purpose of foreclosure, or does some act of notoriety, from which such intent may be inferred. A mere claim to hold the premises as his own is insufficient. If he make no such declaration, and do no such act, the

¹ *Ersine v. Townsend*, 2 Mass. 495; *v. Weld*, 5, 109; *Thayer v. Smith*, 17, 429.
 (b) *Scott v. McFarland*, 13, 309; *Pomerooy v. Winship*, 12, 514. See *Taylor*

(a) In *Tufts v. Adams*, 8 Pick. 547, it was held, that an entry by the mortgagee for breach of condition was an *eviction*, which gave to a purchaser with warranty a right of action on the covenant, without waiting for a foreclosure. The same doctrine was affirmed in the case of *White v. Whitney*, 3 Met. 81.

(b) A case in which the general principles of mortgages, and the rules of law and practice in Massachusetts upon this subject, are very accurately and fully stated.

mortgagor may bring a bill in equity to redeem at any time within twenty years from a tender; more especially, where the mortgagor has died, and the heirs were minors a considerable part of the time; though possession was continued fourteen years after condition broken.

3. So, in *Boyd v. Shaw*,¹ Weston, C. J., says: — “We are warranted in deducing from the law of Massachusetts, as settled by judicial construction, that to effect a foreclosure by proceedings *in pais*, the mortgagee is to make lawful entry for condition broken, of which the parties to be effected (affected) must have actual or implied notice, and that notice is to be implied from a subsequent continued possession.” So where, before the enactment of the Rev. Sts., a mortgagee entered under a lease from the mortgagor for one year; it was held, that, if the mortgagee claimed to hold afterwards for the purpose of foreclosure, he must prove notice of his intention to the party entitled to redeem.² So in New Hampshire, it is said, where a mortgagee enters upon and takes possession of land mortgaged, the entry is either for condition broken and for the purpose of foreclosure, or to receive the current rents and profits of the land, for the better security of the mortgage debt. If the entry is for the latter purpose, no foreclosure will be effected, until the mortgagee gives due notice to the mortgagor, after condition broken, that he shall hold the premises for such breach. Thus a possession for fourteen years after breach of condition was held not to foreclose the mortgage.³ In the same State, a statute provided, that no possession by a mortgagee or his assigns should operate a foreclosure against any one but the mortgagor and his heirs, unless the party in possession should publish a notice in a newspaper six months before the redemption would expire. In the case of *Deming v. Comings*,⁴ it was suggested as a doubtful point, whether the act applied to the case where, the mortgagee or his assignee having entered, the assignee of the mortgagor became a tenant to him;

¹ 2 Shepl. 63.

² *Ayres v. Waite*, 10 Cush. 72.

³ *Hunt v. Stiles*, 10 N. H. 468.

⁴ 11 N. H. 484.

or whether the latter, having actual notice, and himself holding the possession, under the mortgage title, as tenant, would not be foreclosed without an advertisement.

4. But, under the existing law of Massachusetts, a mortgagee entering to foreclose need not give notice to the mortgagor or to a subsequent mortgagee in possession for the same purpose.¹ And in Maine, the assignee of a mortgage, after judgment and before execution, made an entry, with the mortgagor's consent, and after the execution issued remained in possession. Held, from the issuing of the execution he could justify his possession by *process of law*; and as the mortgagor was bound to know of the judgment against him, and of its legal effect, of the issuing of the writ of possession, or when by law it might issue, the foreclosure may be considered as commencing at the time of such issue, and as perfected after three years from that date.²

5. In the same State, the three years of redemption run from the last publication of notice.³ And in New Hampshire, publication of notice of an entry to foreclose, in some newspaper printed in the county, according to law, is a sufficient notice to all interested that the foreclosure has been commenced.⁴

6. It has been held,⁵ that the lawful entry to foreclose a mortgage, under the Massachusetts statute of 1798, c. 77, § 1, is not restricted to one made in presence of two witnesses, or obtained by process of law, as required by St. 1785, c. 22, § 2; but applies to any actual entry, lawfully made for that purpose. The entry in this case was after condition broken. The defendant entered lawfully for that cause, and for the purpose of foreclosure, as appeared by the written consent of the mortgagor, who had till then retained possession. From that time, the mortgagor considered the land as the defendant's, and his right was often recognized by a second mortgagee. The first mortgage was recorded; the second mort-

¹ Hobbs v. Fuller, 9 Gray, 98.

² Hurd v. Coleman, 42 Maine, 182.

³ Holbrook v. Thomas, 38 Maine, 256.

⁴ Howard v. Handy, 35 N. H. 315.

⁵ Boyd v. Shaw, 2 Shepl. 58.

gagor had notice of it; and the mortgagor was for many years the near neighbor of the defendant. The defendant was more than three years in continued possession by his agent, or his tenant, the second mortgagee. Held, an assignee of the second mortgage could not maintain a bill in equity to redeem against the first mortgagee. The Court say:¹ "It has been contended, that the right to redeem is a favored claim. But the extent and limit of the favor due to it has been fixed by law. This we are not at liberty to transcend. It is very manifest, that the movement to redeem had its origin in the very great and sudden appreciation of the land. The plaintiff's grantor, a man of ample means, had slumbered upon the claim now set up for twenty years. He was under no obligation to pay the debt due to the defendant. For the greater part of that period, it was doubtful whether the value of the land was equal to that debt. If it had depreciated, the loss would have fallen upon the defendant; and it is but just that the chance of gain should be accorded to him who runs the hazard of the loss."

7. If the mortgagee, prior to the Revised Statutes, took actual possession, complying with the prescribed formalities; the mortgage became foreclosed after three years, though for twelve or fifteen years and during his life the mortgagor continued to occupy the land, without paying rent or any change in his occupancy. By these proceedings, he became a tenant at will of the mortgagee, and his possession therefore was that of the mortgagee; the terms *actual possession* in the statute being designed merely to negative a possession *adverse* to the mortgagee. The *occupation* was in the mortgagor, but the *possession* in the mortgagee. The Court further remark, that it is not the leading purpose of the statute to give notice to *third persons* of the proceedings to foreclose, but only to the mortgagor; substituting an open and visible entry in place of a judgment, at the time when the term of foreclosure should begin.²

¹ 2 Shepl. 65.

² *Swift v. Mendell*, 8 Cush. 357.

And see *Hadley v. Haughton*, 7 Pick.

29.

8. A mortgagee, having quitclaimed to a third person part of the mortgaged premises, with the knowledge of the mortgagor, entered for condition broken and foreclosure. A certificate, not stating on what part he entered, was indorsed on the mortgage and recorded. The grantee continued in possession of his part of the land three years after such entry. Held, the mortgage, as to this portion, was foreclosed.¹

9. In Massachusetts, the Revised Statutes, c. 107, § 2, having provided that a certificate of entry and possession by the mortgagee shall be evidence thereof; the effect of such certificate cannot be avoided by proof that the mortgagee did not actually go upon the land.² So a mortgagor who signs a certificate, on the mortgage, of a lawful entry on the mortgaged premises, according to the Rev. Sts. c. 107, § 2, cannot deny the fact of such entry.³ So a certificate of two witnesses, made more than twenty years since, to the entry of a mortgagee for the purpose of foreclosure, is admissible in evidence of the mortgagee's title, if supported by the testimony of the witnesses that the entry was made in the presence of the mortgagor, and that they intended, when they signed the certificate, to certify the truth, although they cannot now recall all the facts stated in the certificate.⁴ So an entry on part of land mortgaged by one general description, a certificate of which entry is duly made on the mortgage deed and recorded, pursuant to Rev. Sts. c. 107, § 2, as an entry on the whole land, and followed by three years' possession, forecloses the right of redemption of the whole land, against the mortgagor and all claiming under him by title subsequent to the mortgage, even against such a claimant who during the three years had possession of part of the land, and blasted, cut, and carried away stone therefrom.⁵

10. But, in New Hampshire, a written acknowledgment that the mortgagee has entered and taken peaceable possession for foreclosure, and is in full and peaceable possession

¹ *Raymond v. Raymond*, 7 Cush. 605.

² *Oakham v. Rutland*, 4 Cush. 172.

³ *Bennett v. Conant*, 10 Cush. 163.

⁴ *Smith v. Johns*, 3 Gray, 517.

⁵ *Lennon v. Porter*, 5 Gray, 318.

with an agreement that the mortgagor's entry during the year to take the crops, &c., shall be not in derogation of but in subordination to the mortgagee's title; is no evidence of foreclosure nor of actual possession as against a stranger.¹ So, in Maine, the mortgagor's admission of, or consent to the mortgagee's entry, is not sufficient for foreclosure,² and the witnesses must certify an entry for breach of condition or foreclosure.³ So a statute of Maine provided for the redemption of estates mortgaged, within three years after the mortgagee or his assignee should "lawfully enter and obtain the actual possession of such lands or tenements for condition broken." The entry might be made by process of law; by the consent in writing of the mortgagor or those claiming under him; or by the mortgagee's taking peaceable and open possession in the presence of two witnesses. In the case of *Pease v. Benson*,⁴ the mortgagor signed a paper, containing the words, "I hereby give possession." Held, this paper did not prove the fact, that an actual entry was made, and possession obtained. Even if the parties intended to admit that actual possession had been taken, they could not cause a foreclosure in a manner not authorized by the statute, nor substitute a fiction for an actual entry. The legal effect of the paper, at most, could be no more than to express the consent required by the statute. And it might be doubtful whether it was sufficient even for that purpose, as it did not in terms express consent that possession be taken for condition broken. So under the clause in the statute of Maine, requiring "the consent of the mortgagor or those *claiming under him*;" if the mortgagor has transferred his estate, his grantee must consent. So if he also has conveyed, but taken a mortgage back.⁵

11. Where a mortgage covers several lots in the same county and town, which are in possession of the same per-

¹ *Worster v. Great Falls, &c.* 41 N. H. 16.

² *Chamberlain v. Gardiner*, 38 Maine, 548.

³ *Morris v. Day*, 37 Maine, 386.

⁴ 28 Maine, 336.

⁵ *Chase v. Gates*, 33 Maine, 363.

son; entry on one, to foreclose the mortgage, is sufficient for all.¹

12. A mortgagee need not have his deed with him, nor make any express declaration of his intention, when he enters for condition broken. It is sufficient if it appears that the entry is for such breach. An authority from the mortgagor to deliver possession need not be in writing. Nor need an entry be made at the time upon the land if the mortgagee goes to it, and afterwards takes possession, and occupies, with the knowledge and assent of the mortgagor.²

13. Where one enters as attorney for the mortgagee, but without legal authority, a subsequent adoption of the entry by the mortgagee, by a writing given to the mortgagor, will be sufficient to foreclose the mortgage.³

14. It has been held that an entry, after breach of condition, will be presumed to be for the purpose of foreclosure.⁴

15. Where an assignee enters, after breach of condition, to foreclose the mortgage, although he holds but one of two notes secured by the mortgage, the entry will be considered as made for non-payment of both. And, if the premises were at the time equal in value to the amount of both notes, the foreclosure will operate as payment of both.⁵

16. The assignee of a mortgage takes, by the assignment, all benefits to be derived from any entry by the mortgagee to foreclose.⁶

17. Where part of the mortgaged property is subject to a life-estate, and the mortgagee enters into the residue and retains peaceable possession for a year, giving due notice by publication; the mortgage is foreclosed.⁷

18. In Maine, if the assignee of a mortgage obtains a conditional judgment against the purchaser of the equity, and executes a writ of possession, and the owner of the equity thereupon becomes the tenant of the assignee, agreeing to pay

¹ *Shapley v. Rangeley*, 1 W. & M. 213.

² *Skinner v. Brewer*, 4 Pick. 468.

³ *Cutts v. York, &c.* 6 Shepl. 190.

⁴ *Hunt v. Stiles*, 10 N. H. 468; *Taylor v. Weld*, 5 Mass. 109.

⁵ *Haynes v. Wellington*, 25 Maine, 458.

⁶ *Howard v. Handy*, 35 N. H. 315.

⁷ *Colby v. Poor*, 15 N. H. 198.

him rent; a possession thus held during the time required by the statute will foreclose a mortgage.¹ So in New Hampshire, where an entry is made by a mortgagee to foreclose his mortgage, under Rev. Stats. c. 131, § 14, possession may be held by him through the mortgagor as his tenant; and such possession, being actual and peaceable, is as good as though held by the mortgagee in person.² So if the mortgagee remain in possession a year after condition broken, *with the mortgagor*; this is a sufficient possession to foreclose the mortgage.³

19. A voluntary surrender by the mortgagor, after judgment of foreclosure, and even the taking of a lease from the mortgagee, which recites the judgment, merely gives ordinary peaceable possession to the mortgagee, not possession under the judgment.⁴

20. Where an owner of land conveyed it, taking a mortgage back, and his executor afterwards entered for condition broken, and he, or those claiming under him, foreclosed the mortgage; it was held, upon the question whether there had been a dedication of the land to public uses, that such mortgagee was to be regarded as the owner without interruption.⁵

21. In Massachusetts, a mortgagee in possession, having entered for breach of condition, may still maintain a writ of entry to foreclose the mortgage.⁶ And the commencement of a suit by a mortgagee in possession, to foreclose the mortgage by action, is not an abandonment of his possession.⁷

22. It is held in Maine, that an entry to foreclose a mortgage is *waived*, by the subsequent commencement and prosecution of an action thereupon.⁸ But, in the case of *Fay v. Valentine*,⁹ a bill in equity set forth, that the plaintiff was the owner of an equity of redemption; that the defendant, holding the mortgage, had commenced legal proceedings for possession, recovered a judgment, taken out execution, and received possession thereupon; and that the plaintiff, within

¹ *Hurd v. Coleman*, 42 Maine, 182.

² *Howard v. Handy*, 35 N. H. 315.

³ *Gilman v. Hadden*, 5 N. H. 30.

⁴ *Bellows v. Stone*, 14 N. H. 175.

⁵ *Wright v. Tukey*, 3 Cush. 390.

⁶ *Merriam v. Merriam*, Mass. S. J.

C. October T. 1850, Law Rep. July, 1852, p. 169.

⁷ *Page v. Robinson*, 10 Cush. 99.

⁸ *Smith v. Kelley*, 27 Maine, 237; *Kelley v. Smith*, *Ibid*.

⁹ 5 Pick. 418.

three years, had made the requisite demand for an account. The defendant pleaded, that about the time of such judgment, and more than a year before possession was delivered by the sheriff, he entered for foreclosure, according to law, and had been in possession more than three years, when an account was demanded. Held, the plea was insufficient. The Court say, (in substance,) the writ against the defendant admitted him to be then in possession, and the entry under the judgment showed the mortgagor to have lawful seisin till that time. The entry *in pais* cannot be considered as made for the purpose of foreclosure, while the suit was pending. Had the suit been discontinued, it might have been otherwise. If such entry is not fraudulent, it is calculated to deceive the mortgagor, and expose him to the loss of his opportunity to redeem.

23. It is said, "A foreclosure may be opened by express agreement of parties, or by facts from which such an agreement may be inferred."¹ So, that possession may be abandoned by a mortgagee, either by his own voluntary act of an unequivocal character, or by an arrangement between him and the party holding the equity of redemption, without reference to the effect of such relinquishment of possession upon the foreclosure.² Thus where a mortgagee, having entered for condition broken, is put under guardianship as a spendthrift, the guardian may restore possession to the mortgagor, and so prevent a foreclosure.³ So it is held, that a foreclosure is waived by subsequently receiving part of the debt.⁴ So a bond, given by the mortgagee to the mortgagor before the foreclosure is perfected, conditioned to discharge the mortgage upon payment of the debt at a future day, before which the debt is paid and the mortgage discharged; prevents the foreclosure from taking effect.⁵

23 *a.* A mortgage was made by husband and wife of four parcels of land, three belonging to her, and the other to

¹ Per Thomas, J., *Joslin v. Wyman*, 9 Gray, 63.

² Per Dewey, J., *Charles v. Dunbar*, 4 Met. 503.

³ *Botham v. McIntier*, 19 Pick. 346.

⁴ *Deming v. Comings*, 11 N. H. 474.

⁵ *Joslin v. Wyman*, 9 Gray, 63.

him, to secure his debt. An attorney of the mortgagee entered for breach of condition upon one of the lots belonging to the wife, having the mortgage in his possession, and stating, in presence and hearing of the husband, and of two witnesses, that he entered for condition broken. Afterwards certain acts were done, amounting to a waiver by the mortgagee of this entry. After three years from such entry, the mortgagee, with the assent and at the request of the husband, but without the knowledge of the wife, made a quitclaim deed of the premises to B., who was not, however, present at the time, by which he did "remit, release, bargain, sell and convey, and forever quitclaim unto said B. the land described in said deed of mortgage, entry having been made to foreclose, and the right of redemption having expired, and the said B. having, at the request of said A., (the husband,) paid the amount which would be due on said mortgage. This release is made to said B., at the request of said A., and wife, and is intended to discharge all title acquired by said mortgagee." Held, B. might recover the land from A.¹

23 *b.* Upon the same principle, where the purchaser of an equity of redemption agreed to receive the price paid by him more than one year from his purchase; held, a waiver of all claim to absolute title.² So a mortgagee, having taken possession according to the statute, stipulates in writing to reconvey, whenever the debt should be satisfied out of the rents and profits, or otherwise. Held, the mortgagor, notwithstanding the lapse of more than three years, may have a bill in equity to redeem.³ So a parol agreement was made between a mortgagor and mortgagee, that the land should be taken in satisfaction of the debt. Held, the mortgagor was entitled to redeem, and the mortgagee, who had subsequently assigned the mortgage, was estopped from setting up the parol agreement.⁴

¹ *Rangely v. Spring*, 28 Maine, 127.

² *McLear v. Morgan*, 5 B. Mon. 282.

³ *Quint v. Little*, 4 Greenl. 495.

⁴ *Whitney v. McKimney*, 7 Johns. Ch. 144.

24. But an instrument waiving the entry of the mortgagee will have no effect, unless delivered to the mortgagor.¹ And the waiver of foreclosure must be made by him who is *the party at the time*.² So where the assignees of a mortgagor, long before the three years after entry for foreclosure had expired, paid the amount of the debt to the assignees of the mortgage, entered upon the land, and received an agreement in writing to assign or convey to them on demand, and to pay over the money, in case of redemption; but also to perfect the foreclosure, if requested by the mortgagor's assignees: held, the entry was not waived.³ So a mortgage may be assigned after an entry for foreclosure, and the assignment will not of itself stay the foreclosure.⁴ So an entry is not waived or postponed by the mortgagee's rendering an account, in which he charges himself with rent, as commencing after such entry.⁵ So if a statement of a mortgagee to the mortgagor, made one month previously to the time when the entry to foreclose would become perfected, that "he would give him some time, but that he must not wait long, as he might take advantage of the mortgage," be binding on a grantee of the mortgagee, without notice; the right of redemption does not continue five years without payment or tender.⁶ So a promise made by a mortgagee, after the time limited for redemption in a decree for foreclosure, to receive the debt and surrender all claim to the land, will have no effect, unless made on legal and sufficient consideration.⁷

25. After the time limited for redemption by a decree of foreclosure had expired, the assignee of the mortgagor contracted to pay the mortgagee a sum exceeding the amount due on the mortgage, and to receive a deed of the land. He paid as much as was due, gave his note for the remainder, and took the deed. Held, he was liable on the note, though induced to enter into the contract by the peculiar situation of his business, which was unknown to the other party.⁸

¹ *Cutts v. York*, &c. 6 Shepl. 190.

² *Fisher v. Shaw*, 42 Maine, 32.

³ *Cutts v. York*, &c. 6 Shepl. 191.

⁴ *Hurd v. Coleman*, 42 Maine, 182.

⁵ *Hobbs v. Fuller*, 9 Gray, 98.

⁶ *Danforth v. Roberts*, 20 Maine, 307.

⁷ *Smalley v. Hicok*, 12 Verm. 153.

⁸ *Ibid.*

CHAPTER XXXV.

FORECLOSURE IN CASE OF THE INSOLVENCY OF THE MORTGAGOR.

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| 1. Insolvency of the mortgagor's estate after his death. | mortgagor during his life ; proceedings of Insolvency Courts. |
| 8. Insolvency or bankruptcy of the | |

1. THE law provides peculiar modes of foreclosing a mortgage, more summary and favorable to the mortgagee, in many of the States, than the ordinary methods ; where the mortgagor becomes *insolvent*, and no chance remains of satisfying the debt in any other way.

2. In case of the insolvency of a mortgagor, or of his estate, *after his decease*, the rights of the mortgagee in obtaining payment of his claim have been a subject of much conflicting opinion and practice. One course has been, where a mortgagor dies insolvent, to have the whole debt allowed by the commissioners of insolvency, and permit the mortgagee, after receiving his dividend upon this sum, to hold the land as security for the balance. This practice has been adopted in Connecticut and New Hampshire. But in Massachusetts the practice is, to allow the mortgagee only the excess of the debt over the value of the mortgage. This is in analogy with the English practice in cases of bankruptcy. And, in England, the mortgagee will be allowed to prove against the estate of the deceased mortgagor only what remains due after a sale of the land.¹ (a)

¹ *Amory v. Francis*, 16 Mass. 308 ; *Halsey v. Reed*, 9 Paige, 446 ; *Church Greenwood v. Taylor*, 1 Russ. & M. 185 ; *Doc v. McLoskey*, 1 Ala. (N. S.) 798 ; *Rowe v. Young*, 4 Y. & Coll. 204 ; *v. Savage*, 7 Cush. 441. See *Belloe v. Rogers*, 9 Cal. 123.

(a) The allowance of a mortgage debt (in case of the mortgagor's decease) has the same effect as that of any other debt. No foreclosure being necessary, a bill for that purpose cannot be sustained. *Falkner v. Folsom*, 6 Cal. 412.

3. In the case of *Amory v. Francis*,¹ Parker, C. J., remarks: — “ The rule adopted by the Court of Chancery in England, and enforced by the commissioners of bankruptcy, is certainly just and equitable ; requiring that every creditor, having a mortgage or other security, shall, before he is admitted to prove his debt, surrender his security for the benefit of the other creditors, the proceeds of the sale going into the common fund ; or shall suffer the pledge to be sold, taking the proceeds towards his debt, and proving under the commission for the residue. If it were not so, the equality, intended to be produced by the bankrupt laws, would be grossly violated ; and the creditor holding the pledge would in fact have a greater security than that pledge was intended to give him. For, originally, it would have been security only for a proportion of the debt equal to its value ; whereas by proving the whole debt, and holding the pledge for the balance, it becomes security for as much more than its value, as is the dividend which may be received upon the whole debt. There seems to be no good reason why the same rule should not be applied to the settlement of the estates of deceased insolvent debtors in this Commonwealth. For the statute, which provides for the distribution of these among creditors, requires an equal *pro ratâ* distribution ; and it never could have been intended by the legislature, that a creditor having security should have any advantage beyond the actual value of the property secured. If the creditor had taken possession of the mortgaged premises and foreclosed the mortgage, he would have a right to consider the estate as payment of the debt *pro tanto*, according to its value, and file his claim before the commissioners for the balance ; as has been settled in several cases. Now, although it does not appear, in the case before us, that the mortgagee has entered for condition broken ; yet he insists upon holding his mortgage, and it ought to be presumed that he means to enter and hold the estate ; so that no injustice will be done to him by considering it as payment according to its value. For he

¹ 16 Mass. 311, 312.

will either hold the estate discharged of the condition, or will receive his whole debt with interest, if the administrator should deem it for the interest of the creditors to redeem. For, notwithstanding the debt may much exceed the value of the pledge, the administrator cannot redeem without paying the whole debt. If there is any difficulty in applying this rule here, it arises from the want of a compulsory power to sell the mortgaged property, as would be done before commissioners of bankrupt in England. This, however, may be done by consent; the administrator applying to this Court for leave to join in the sale, and to execute a release of the right of redemption. If the parties should not consent, the commissioners might estimate the value of the mortgaged estate, and deduct so much from the creditor's claim, leaving him to his right under the mortgage; and either he or the administrator, if dissatisfied, may take measures to have the estimate corrected by a Jury on a trial at law; and both of them will be bound by the issue." (b)

4. In the same State, where the estate of a deceased mortgagor is represented insolvent, in a bill for redemption brought against the mortgagee by a purchaser of the equity of redemption from the heirs, the defendant may claim the full balance due upon the mortgage, although he has proved his debt before commissioners, and received dividends, deducting

(b) In the case of the *Middlesex Bank v. Minot*, (4 Met. 325,) the doctrine laid down in *Amory v. Francis* was affirmed; and it was further held, that where the mortgagees, after the mortgagor's death, sold the property (being shares in a bank) at public auction, under a power of sale contained in the mortgage, *but themselves became the purchasers*; the sale was void, and the mortgagees could not claim a balance of their debt before commissioners of insolvency, until further proceedings to settle the value of the shares.

So in a later case it is held, that if a mortgagor of personal property dies insolvent, in order to prove the whole debt before commissioners of insolvency, the creditor must waive his security. But if he apply it to the claim, and a balance still remain due, he may prove such balance. *Farnum v. Boutelle*, 13 Met. 159.

the estimated value of the land. The defendant may also claim the amount of a prior mortgage paid by him, after taking possession, although discharged upon the record before the plaintiff's title accrued; if the whole amount claimed by the defendant is less than what appeared due upon his mortgage by the record.¹

5. In Vermont, a failure, on the part of the mortgagee, to present his claim to the commissioners upon the estate of the deceased mortgagor, does not affect the validity of the mortgage.² Nor does the presentment of the claim have this effect.³ So the mortgagee's claim against the estate of the mortgagor may be allowed, without affecting the mortgage.⁴

6. In Connecticut, in the case of *Findlay v. Hosmer*,⁵ it was held that where a mortgagee, the mortgagor having died insolvent, proved his claim before commissioners; a purchase of the equity of redemption by him did not extinguish such claim, or preclude him from a distributive share.

7. In a suit brought for the administration of assets, a mortgagee prayed that he might prove his debt in full, and the mortgaged estate be sold, and that to the extent of the deficiency he might receive payment from the proof in the cause *pari passu* with the other creditors. Held, as in bankruptcy, he could only prove for the deficiency.⁶

8. Similar rules prevail (as has been already suggested) in case of the bankruptcy or insolvency of the mortgagor while living; the Court, in which proceedings are pending, being usually empowered to authorize an immediate sale of the mortgaged property, and admit the mortgagee to prove the balance of his claim, with other creditors, for the purpose of a dividend.⁷

9. Under the late bankrupt law of the United States, the mortgagee might take the security at its value, to be ascertained by the Court, and prove for the balance. Or the

¹ *Davis v. Winn*, 2 Allen, 111.

⁵ 2 Conn. 350.

² *Grafton, &c. v. Doe*, 19 Verm. 463.

⁶ *Greenwood v. Taylor*, 1 R. & My. 187.

³ *Putnam v. Russell*, 17 Verm. 54.

⁷ See *Hilliard on Bankruptcy*, &c. 117.

⁴ *Walker v. Baxter*, 26 Verm. 710.

Court might order it sold or appraised, or allow the creditor to take it, at its full nominal value.¹ (c)

10. In Massachusetts, it is provided by statute, 1838, (*the Insolvent Law*, c. 163, § 3,) that when the creditor of an insolvent debtor holds a mortgage to secure a debt, the property may be sold, if he so require, and the proceeds applied to such debt, and he be admitted as a creditor for the residue, if any. Or such creditor may release and deliver up to the assignees the premises held as security, and shall thereupon be admitted as a creditor for his whole debt. Unless the property is thus sold or released, the creditor cannot prove any part of his debt.

11. Under this act it has been held, that such creditor cannot prove his claim at the first meeting; at least, not till after the choice or appointment of an assignee. The statute provides, that all papers necessary to the sale shall be executed by the creditor *and the assignee*, or the property *given up to the assignee*; neither of which conditions can be complied with, unless there be an assignee in existence.²

12. The statute has been held applicable, although the collateral security in question was not given by the insolvent himself. Thus a note was made by three persons, one of them being in reality the principal, and the others mere sureties. The principal gave a mortgage to the creditor as security. All the makers having become insolvent, the payee offered to prove the whole amount of his debt, without deducting the value of the property mortgaged, against the estate of one of the sureties. Held, the case was within the equity, if not the letter of the statute, and such proof could not be allowed.³

¹ Case of Grant, Law Rep., Nov. 1842, p. 393.

² Case of Baker, Sup. Jud. Court, Jan. 1846, 8 Law Rep. 461.

³ Lanckton v. Wolcott, 6 Met. 305.

(c) Under this law, a *judgment* creditor, who proved his debt, thereby lost the lien of the judgment upon real estate. Briggs v. Stephens, Law Rep. Oct. 1844, p. 281, (N. Y.); case of Christy, 3 How. 292.

13. The Supreme Court of Massachusetts have no appellate jurisdiction, under the insolvent act of 1838, c. 163, § 3, of an application by a mortgagee under sect. 3 for a sale of the mortgaged property ; but under sect. 18 of the same act, they have original jurisdiction of such application, and will therefore act upon a petition, praying for a revision of the proceedings of a Master in Chancery upon such application, the petitioner having appealed from his decision.¹

14. Where an application to a Master in Chancery, acting under the insolvent law, for a sale of mortgaged property, is opposed, upon the ground that the mortgage is fraudulent ; the fraud or preference must be specially set forth, and the evidence of it in some form laid before the Court. A general allegation is not sufficient.²

15. Stat. 1838, c. 163, § 3, does not authorize an absolute sale of mortgaged premises, upon petition of the mortgagee to the Master in Chancery, where the equity of redemption has been absolutely conveyed by the insolvent, with a verbal condition to reconvey, upon payment of a debt. Such a construction would be inconsistent with the statute, which allows a right of redemption for three years, and this act is not to be considered as repealed by implication. But where both creditors thus petitioned, and the petition of the first was granted, and that of the second disallowed, and the latter then applied to the Supreme Court for an injunction of the sale by the first mortgagee, and for permission to sell upon his own petition ; held, the petitioner having thus submitted himself to the Court, a sale of the estate should be ordered, the two mortgagees joining the assignee in the deed ; and the proceeds applied to the mortgages in their order.³

¹ *Barnard v. Eaton*, 2 Cush. 294.

³ *Hunnewell v. Goodrich*, 3 Cush.

² *Barnard v. Eaton*, 2 Cush. 294. See 469.
Eastman v. Foster, 8 Met. 19.

CHAPTER XXXVI.

EFFECT OF FORECLOSURE UPON THE DEBT; HOW FAR IT OPERATES AS PAYMENT; SUIT FOR A BALANCE; OPENING OF THE FORECLOSURE.

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| 1. General effect of foreclosure. | 3. Opinions of elementary writers. |
| 2. Foreclosure is payment <i>pro tanto</i> ; whether an action can be brought for a balance, and whether the foreclosure is thereby opened. | 5. English decisions. |
| | 9. American decisions. |
| | 35. Miscellaneous points. |

1. It has been repeatedly stated in the foregoing pages, that, so long as the mortgagee retains his mortgage, and the estate thereby transferred, merely as security for a debt, he still remains in all respects *a creditor*, and may pursue all his remedies for the purpose of obtaining satisfaction of such debt. *Foreclosure*, however, in whatever way effected, of course works an important change in the relation of the parties to the mortgage. The mortgagee, or, in case of foreclosure by sale, the purchaser, becomes absolute owner of the property, and the mortgagor loses all title to it. But an important question remains, as to the effect of this change of title upon the mortgage debt.

2. The principle is well settled, upon this subject, that foreclosure pays or extinguishes the mortgage debt, to the extent of the value of the property. "The foreclosure of a mortgage is in no strict legal sense a payment; yet inasmuch as it would be inconsistent with the plain principles of justice for the mortgagee to hold the land, and yet receive the full amount of his debt, and as the debtor is precluded by force of the statute from redeeming the land, the Courts have said, as a rule plainly resulting from the operation of the statute, that the value of the land shall enure by way of payment; and as there is no act of the parties ascertaining this value,

it shall be fixed by appraisement.”¹ So “upon foreclosure, the whole debt is paid, though made by an assignee, who holds only a part of such debt; if the premises are of sufficient value.”² So, if a mortgagee foreclose his mortgage, his debt becomes, by that act, extinguished, to the extent of the value of the land at the time of the foreclosure; and any other things, which he may hold as collateral security for the debt, become thereby exonerated to the same extent.³ (a) The only points of doubt and discussion have been, first, whether the mortgagee may still maintain an action for the balance of the debt, after deducting such value; and second, whether by the bringing of such action the foreclosure is opened, and the right of redemption revived.

3. Upon this subject Chancellor Kent says:⁴ — “The better opinion is, that such action (an action for the balance of the debt) may be brought.” Judge Story says:⁵ — “If foreclosure of a mortgage operated as payment of the debt, it would frequently prove, in literal exactness of language, *mortuum vadium*, a dead and worthless security. If the mortgagee is compellable to make an election, the pursuit of a remedy upon the personal security is an abandonment of the pledge, while an appropriation of the latter is an abandonment of the debt. In a case, therefore, of suspected insolvency, he would be encircled with perils on every side; and, instead of a double security for his debt, would be left with scarcely a single plank to save himself in the shipwreck.”

4. Upon the general subject of opening a foreclosure, Mr. Coote remarks, that a foreclosure in equity may sometimes

¹ Per Shaw, C. J., *Briggs v. Richmond*, 10 Pick. 396; *Hurd v. Coleman*, 42 Maine, 182.

² *Johnson v. Candage*, 31 Maine, 28.

³ *Smith v. Packard*, 19 N. H. 575.

⁴ 4 Comm. 183.

⁵ *Hatch v. White*, 2 Galli. 154.

(a) Where a mortgagee is assigned as collateral security, and foreclosed by the assignee, and the land afterwards sold; the debt secured by such assignment is not paid by such sale, but only by actual receipt of the price. A distinction is made between such a case, and the effect of foreclosure as against the parties to the mortgage; in reference to whom foreclosure operates as payment. *Brown v. Tyler*, 8 Gray, 135.

be opened many years after the decree and the possession under it; as where the decree was obtained by fraud.¹ He further says,² Equity will not open a decree of foreclosure, by reason of the overvalue of the estate, and a parol agreement to permit a redemption; and, after twenty years' possession, the Court will not set aside a foreclosure for mere form. Nor will it be opened merely because the mortgagee devises the estate as money, or notices it, for a collateral purpose, as a debt; nor where the estate has been considerably altered, as well as long in possession of the mortgagee. It is said no general rule can be laid down upon the subject, but each case depends on its own circumstances.

5. In *Tooke v. Hartley*,³ the bill in the original cause by the mortgagee was, that the defendant, the mortgagor, might redeem or stand foreclosed; and there was the common decree of foreclosure; the defendant not paying the money reported due by the time appointed, he was absolutely foreclosed. The plaintiff, the mortgagee, afterwards sold the estate so foreclosed, and the money produced by the sale not amounting to what was reported on the mortgage, he brought his action against the mortgagor to recover the deficiency. The plaintiff in this suit thereupon brought his bill for an injunction, to stay the defendant's proceeding at law, upon the ground that, having got his pledge, he could have no more, and obtained an injunction till answer and further order. Upon showing cause for continuance of the injunction, his lordship (Lord Thurlow) was clear, that the defendant, the mortgagee, under the mortgagor's covenant in the mortgage deed, was entitled to be paid what was due on the mortgage; that so long as he kept the estate, he must take the pledge as a satisfaction, because, by not knowing what it would produce, he could not say anything was due; but if he sold the estate fairly, and without collusion, and for the best price, it would then appear whether it produced the amount of the money reported due; and to the extent of what it did not, the mortgagee had a right, and so it was

¹ *Cooté*, 579.

² *Ibid.* 571.

³ 2 *Dick.* 785.

now established, to bring an action against the mortgagor to recover the deficiency. Injunction dissolved.

6. In the case of *Perry v. Barker*,¹ Lord Eldon intimated an opinion, that a suit would not lie upon the debt, after a sale of the land, because the mortgagee no longer had power to reconvey the estate; but at the same time remarked, that Lord Thurlow had decided that the action might be maintained, either before or after a sale. In a subsequent hearing of the same case,² Lord Erskine held, that an action would lie upon the bond after foreclosure; but the right of redemption was thereby revived, and, if the mortgagee had sold the land, he should be allowed time to get it back. But where this could not be done, that the suit would be restrained by a perpetual injunction.

7. In *Perry v. Barker*,³ which was a mortgage for a long term of years, the mortgagee obtained a decree of foreclosure, took possession, sold the estate by auction, and afterwards called upon the mortgagor for the balance of the debt, with interest from completion of the sale, and brought an action upon the mortgage bond. The plaintiff files a bill praying for redemption and injunction, or that the defendant may be decreed to have elected to take the premises in satisfaction of his debt, to deliver up the bond, and be forever restrained from proceeding against the plaintiff. Lord Eldon says:⁴—"No case has been produced, previous to 1786, in which, after a foreclosure, the mortgagee has brought the estate to sale, and afterwards brought an action for the money. That circumstance has some weight. The action in that case must have been for the whole money, for it was an action upon the bond. But consider how it would be if the action was upon the covenant, laying the damages for the remainder of the money. It is not very consistent to say, you open the foreclosure, desiring him to bring in only the remainder of the money; for the consequence of opening the foreclosure would be, that a new account should be

¹ 8 Ves. 527.

² 13 Ves. 197.

³ 8 Ves. 528.

⁴ *Ib.* 531.

taken of the principal and interest; and the money to be brought in upon that footing should be all that is due, or nothing. The case of *Tooke v. Hartley* certainly does not decide this; for the estate, in fact, sold or not, was in the possession of the mortgagee; and if placed in the same situation as if there had been no foreclosure, the estate being in his possession, what was required by justice as to the reconveyance might be done by the Court. But where it is sold to a stranger, that cannot be. The power of reconveyance is gone, and the mortgagor cannot have the right, if it is to be considered opened. At the same time I certainly understood Lord Thurlow's opinion to have been, that, whether the estate was sold to a stranger, or remained in the possession of the mortgagee, there was no distinction; but an action might be brought for the difference. That opinion of Lord Thurlow, and the circumstance that this particular case was never decided, make it proper at present to grant the injunction, extending it to stay trial, the plaintiff paying the money into court."

8. In the case of *Lockhart v. Hardy*,¹ the Master of the Rolls expressed an opinion, that a Court of Equity would grant an injunction, against a suit at law upon the personal obligation, for which a mortgage had been given as security, after foreclosure of the mortgage; and refused to let the mortgagee come in under an administration suit, and prove for the deficiency.

9. In *Hatch v. White*,² Judge Story expresses doubts, whether a suit upon the mortgage debt should be enjoined by a Court of Chancery, until the mortgagee has been fully paid; and also whether the foreclosure is opened by bringing an action for the debt. He remarks, that a foreclosure may properly be regarded as *a purchase*, at the full value of the land, if less than the debt, and, if greater, at the amount of the debt. Where the debt is much less than the value of the land, the mortgage will seldom be foreclosed; hence foreclosure is *primâ facie* evidence that the land is insuffi-

¹ 9 Beav. 349.

² 2 Galli. 159, 160, 161.

cient to pay the debt. By taking the land, the creditor suffers an inconvenience. He must lose by any depreciation of value, and therefore he ought to have the benefit of any rise in value. If after foreclosure the mortgagee should go into a Court of Equity for further relief, he might be held to the rule of reciprocal equity ; but this does not justify an injunction against the enforcement of *legal rights*. And even if such injunction should be granted where the estate remains unsold ; it would seem that after a sale he ought to recover the balance due. Whatever may be the practice in equity, all decisions concur in the principle, that *at law* foreclosure of a mortgage is no bar to a suit for the balance of the debt. Judge Story further holds, that whatever rule upon this subject a Court of Chancery, acting upon its own peculiar principles, may adopt, it will not authorize the opening of a foreclosure, in consequence of a suit upon the bond, where the right of redemption is by statute limited to a certain time after possession taken by the mortgagee.

10. Assumpsit for the balance of a simple contract debt, originally secured by mortgage. The plaintiff had foreclosed the mortgage and taken possession ; and now sued for the balance of the debt, deducting the value of the mortgaged property at the time of foreclosure. Story, J. :—“ This question has been long since settled by the local law. In *Amory v. Fairbanks*, (3 Mass. R. 562,) the Supreme Court of this State affirmed the right ; and this Court afterwards, in *Hatch v. White*, (2 Gallison, R. 152, 161,) recognized the same doctrine. It is too late now to controvert it.”¹

11. In Massachusetts it is now provided by statute,² that where a suit is brought upon the debt after foreclosure, the mortgagor may redeem within one year from the recovery of judgment. Independently of this express provision, several cases have been decided, relating to the points now under consideration.

12. Mortgage to secure several notes. The mortgagee

¹ *Omalv v. Swan*, 3 Mas. 474.

² Rev. Stats. 638. See Gen. Stats.

assigns the notes and mortgage, the assignee agreeing to pay him \$500, as soon as it could be collected on one of the notes for that sum. The assignee received \$30 on this note, and took possession for the purpose of foreclosure. The mortgagor occupied for some time afterwards as his tenant, but, being insolvent, never paid rent. Within three years from the entry, the mortgagee brings an action against the assignee, declaring upon his contract, and for money had and received. Held, the taking possession was no payment of the mortgage, and therefore the defendant was not liable upon his contract; and that he was not liable for the \$30, unless specially demanded, till the whole sum was paid; nor for any more rent than he had actually received.¹

13. In a later case, the following remarks were made by the Court: — “That a foreclosure may be opened after the three years have elapsed, by express agreement, or by facts and circumstances from which such an agreement may be satisfactorily inferred, where the parties choose to consider the property as a mere security for an existing debt, and where the rights of others have not intervened, we are inclined to admit. But it cannot be allowed where the facts which are relied upon are at all doubtful in their character; or where they may be explained consistently with the right of the mortgagees to retain the estate under the foreclosure. We are aware that the Revised Statutes make provision only in one instance for the opening of a foreclosure, after the time for redemption has expired. Where the mortgagee, or person entitled to the debt secured by the mortgage, shall, after the foreclosure, “recover judgment for any part of the debt, on the ground that the value of the mortgaged premises, at the time of the foreclosure, was less than the sum due thereon, such recovery shall open the foreclosure, and the mortgagor, or the person claiming or holding under him, may redeem the premises; provided his bill of redemption be brought within one year after the recovery of such judg-

¹ West v. Chamberlin, 8 Pick. 336.

ment." Revised Statutes, chap. 107, sec. 33. And it is argued from that provision, that a foreclosure can be opened in no other case, and, if opened, the bill for redemption must be filed within one year after. It must be observed, however, in answer to this argument, that this statute provision relates to a case where the parties have rights secured to them by the express terms of the law. But the cases to which we have referred, where a foreclosure may perhaps be opened, and the mortgagor restored to his right of redemption, are those which result from the agreement of the parties, and not from statutory provisions. In the case at bar, sundry payments have been made by the mortgagor since the three years after entry for condition broken have expired; admitting for this purpose, that the possession was continued by the mortgagees so as to perfect their right under their entry. But the value of the premises, at the time when the right of redemption expired, is not stated nor agreed upon; nor does it appear whether the payments were made because the debt was not satisfied, and the party made them in good faith, toward the payments of the balance of the debt, after crediting the value of the land, or whether they were made under an agreement to open the foreclosure. The only fact that clearly appears, is that of payments, after the foreclosure, on account of the debt; but this furnishes no satisfactory evidence of an agreement to open the foreclosure."¹

14. In the same case it was held, that mere receipt of a part of the money, after foreclosure, does not of itself prove the intention of the parties to open the mortgage and waive the foreclosure. Thus, after the expiration of three years from the entry to foreclose, money was received "as interest on the note secured by mortgage;" but it appeared, that during the three years the mortgagor had occupied as tenant and paid no interest, and the above payment did not exceed the interest then due, as an equivalent for the rent. Also, that after the mortgage was admitted by the mortgagor to

¹ Per Hubbard, J., *Lawrence v. Fletcher*, 8 Met. 165, 166.

be foreclosed, he requested the mortgagees to give him one month more to pay the note, and they assented to it. Held, the payment did not open the foreclosure, and that the contract was a mere executory agreement, constituting a limited extension of the time, within which, if the debt were paid, the mortgagor might claim a reconveyance in equity; or, if he were in possession, the mortgagee enjoined from suing him at law. But on the expiration of the time, payment not being made, the mortgagee became absolute owner, in law and equity.¹

15. In another case in the same State, the general doctrine upon this subject is stated, with certain qualifications growing out of the peculiar circumstances of that case.

16. "If the original creditor continues to hold the note, and converts the property held as collateral into money, or forecloses a mortgage upon it, it may operate as payment in whole or in part, according to its value. So, if the indorsee of the note is also the assignee of the mortgage. But here the plaintiff was not assignee of the mortgage, and took no interest in or claim to it, legal or equitable. If the bank took the whole of the mortgaged property for one or two of the notes held by them, and if the property was worth much more than the amount of the notes, it cannot affect the plaintiff's right as indorsee. If not redeemed, and they foreclosed the mortgage rightfully, as a mortgage of the whole property for each several note, it was done in pursuance of a right conferred on them by the defendant."²

17. By request of a mortgagor, after the mortgagee had been in possession more than two years for foreclosure, A. took an assignment of the mortgage, and paid the debt, orally agreeing with the mortgagor to hold the mortgage for his use and benefit, subject to the repayment of the amount paid, and to allow the mortgagor to sell the lands in lots, paying the proceeds to him, till reimbursed, and to redeem the land at any time, by paying the amount advanced, with

¹ *Lawrence v. Fletcher*, 10 Met. 344.

² Per Shaw, C. J., *Leland v. Loring*, 10 Met. 125.

interest. Held, this agreement did not stop the foreclosure, nor create a trust for the mortgagor. The whole consideration being paid by A., no implied trust arose; and there was no express trust, for want of a writing. Nor did the agreement constitute a mortgage, being subsequent in time to the original conveyance.¹

18. Eight days before expiration of three years' possession, the mortgagees agreed with the mortgagor for themselves and all claiming under them, that, in consideration that no bill should be filed to redeem, the right of redemption should be continued for one year from the 7th of May, 1838; and, on his part, the owner of the equity agreed, that during said year no bill should be filed to redeem, and that on the 7th of May, 1839, the principal and compound interest, on the amount secured by the mortgage, including expenses, &c., should be paid to the owner of the mortgage, or, in default thereof, said right in equity should be foreclosed. Before the year elapsed, a bill to redeem was preferred. Held, a contract to forbear to prefer a bill to redeem, for a limited time, is valid, though not under seal; that this contract must be restricted to the eight days, during which the right to prefer a bill remained; that the stipulation not to prefer a bill during the year, and at the end of the year to be foreclosed, unless the sums stipulated were paid, was void, or at least voidable; and that the agreement not only carried the right to redeem over the year, but protracted it indefinitely.²

19. If, by an agreement to postpone the day of foreclosure, the power or right to redeem be interrupted, the mortgagee will be put to a new entry in order to foreclose.³

20. Though the stipulation not to redeem during the year was void or voidable, yet the other stipulations were valid, that the owner of the equity of redemption, in order to entitle him to maintain his bill, should pay the amounts agreed upon in the contract.⁴

¹ Capen v. Richardson, 7 Gray, 364.

² Daniels v. Mowry, 1 Rhode Island, 151.

³ Ibid.

⁴ Ibid.

21. In Connecticut a statute provides, that, after foreclosure, the mortgagee may maintain an action for the balance of his debt, estimating the value at the time when the right of redemption expired.¹

22. If the value of the property exceeds the debt, foreclosure operates as payment, even at law.²

23. Prior to any statute upon the subject, several cases occurred, in which the points now under consideration were considered.

24. Action of disseisin. Plea, that the defendant mortgaged the demanded premises to secure two notes, one of which had been paid, and upon the other a judgment recovered, and execution taken out, and that "the plaintiff having made his election of the personal security given as aforesaid, said deeds have become void in law." Judgment for the plaintiff.³ The Court say :⁴ — "The plaintiff's deed vested him immediately with the fee of the land, and was defeasible only by the payment of two certain notes, one of which is not yet paid. The suit had upon it was a demand, but not payment. As to the plaintiff's having made his election by that suit, it is true he can have but one satisfaction for his debt, but both securities hold till he has that. No proceedings on the note, short of payment, will exonerate the land, nor will ejectment, or any proceedings on the land, discharge the note, unless it be a foreclosure of the equity of redemption, which takes it out of the nature of a pledge, and appropriates it in payment; nor, as hath been contended, is the pendency of a process on one of the securities a bar in the mean time to a process on the other. Satisfaction for the debt is the object; this it is the duty of the debtor to make, and all the pledges or securities he has seen fit to give, to enforce a fulfilment of the duty, hold, and may be relied on and pursued until it is performed. Should there be an attempt to pursue either of them further, specific relief may be had, by an *audita querela*, or a bill in equity."

¹ Conn. Stat. 194.

² Bassett v. Mason, 18 Conn. 131.

³ Coit v. Fitch, Kirby, 254.

⁴ Ibid. 255.

25. Action to recover a note. Plea, that the debtor mortgaged, to secure the same, land of greater value than the note, and that possession had been taken of said land, and the mortgage foreclosed by a decree in Chancery; and thereby the note was paid. Replication, that the rents did not pay the interest of the amount of the debt; that the plaintiff sold the land at auction, and it brought a certain sum less than that amount. Upon demurrer, held, the replication was insufficient. The Court say:—“In this State, a mortgage given to secure a debt by bond, note, or other specialty is a real security given in aid of the personal security, which the mortgagee had before. And the mortgagee may pursue either, or both, until he obtains satisfaction. If he recovers his debt, the mortgage is released. If he choose to take the land and to make it his own, absolutely, whereby the mortgagor is totally divested of his equity of redemption, the debt is thereby paid and discharged. And if it eventually proves insufficient to raise the sum due, it is the mortgagee's own fault, and at his risk.”¹

26. A creditor, whose claim was secured by mortgage, obtained a decree of foreclosure against the mortgagor; the time limited by the decree for redemption expired; and the plaintiffs took possession of the mortgaged premises. In an action against a sheriff, for neglecting to serve and return an execution, founded upon a judgment recovered on the mortgage debt, the defendant relied upon such foreclosure as a defence. Held, the defence was valid. The Court say:—“It is unnecessary to examine the case with a view to first principles. In this State, it has long been considered as established law, that a foreclosure and consequent possession is in the nature of satisfaction of a debt secured by mortgage. It is deemed an appropriation of the thing pledged, in payment of the demand for which it was security. On this foundation estates have been purchased, and much inconvenience would probably arise from the adoption of new principles at

¹ *McEwen v. Welles*, 1 Root, 202, 203.

this time, in subversion of titles founded on valuable considerations. Waiving the expression of an opinion on the legal fitness of the rule, in the absence of precedent, I am of opinion that the law is settled, and ought not to be disturbed.”¹

27. In Maine,² where a mortgage is foreclosed, the value of the land shall go to extinguish the debt, wholly or *pro tanto*. The mortgagee may recover the balance,³ but is not entitled to an account of profits.⁴

28. In Vermont, a decree of foreclosure, whether upon a bill in chancery, or in an action of ejectment, and an expiration of the time of redemption, and possession, operate as a satisfaction of the mortgage notes, if the property is sufficient, if not, as payment *pro tanto*.⁵ An action may be maintained upon promissory notes, though secured by a mortgage which has been foreclosed, and though, with others secured in the same way, they were described in the bill of foreclosure; if it appear that they were not presented to the Master in Chancery on taking the account, nor included in the decree. A mortgagee is not bound to foreclose for all his notes.⁶

29. In New Hampshire it is said: “The object of such entry is to procure payment by foreclosure, unless payment should be otherwise made, and the land discharged; and whenever the title to the land is perfected by this process, the debt is extinguished so far as there is actual value received.”⁷

30. In New York, the following case has been decided. Declaration on a bond. Plea, that the bond was executed concurrently with, and as collateral security to, a mortgage; that the mortgage was foreclosed in chancery; and the mortgaged premises sold, whereby the debt was satisfied. Replication, that the premises did not sell for sufficient to satisfy the bond and mortgage; and the plaintiff showed that

¹ The Derby, &c. v. Landon, 3 Conn. 62, 63, 64.

² Southard v. Wilson, 29 Maine, 56.

³ Porter v. Pillsbury, 36 Maine, 278.

⁴ Ibid.

⁵ Paris v. Hulett, 26 Verm. 308, acc. Lovell v. Leland, 3 Verm. 581; *contra*, Strong v. Strong, 2 Aik. 373.

⁶ Langdon v. Paul, 20 Verm. 217.

⁷ Per Upham, J., Hunt v. Stiles, 10 N. H. 469.

more than \$4,000 were unpaid by the sale or otherwise. General demurrer and joinder. Held, the plaintiffs were entitled to judgment.¹

31. In New Jersey, if after foreclosure by decree the creditor proceeds for the debt, the foreclosure is opened.²

32. In Maryland, the Court remark as follows : — “ The mortgaged estate is considered as a pledge sufficient for the satisfaction of the debt ; and as having been so taken by the parties themselves by the nature of their contract. Therefore if the creditor, on his bill in equity, has a decree to foreclose and nothing more, he is held to have obtained that kind of satisfaction of his claim for which he stipulated ; and if after such a decree he sues upon the bond, he thereby opens the decree, and admits the right of the mortgagor to redeem ; because by the institution of the suit he disclaims the satisfaction he had obtained by the decree. And if he has placed it out of the mortgagor’s power to redeem, by aliening the estate after the decree, he will be perpetually enjoined from proceeding upon the bond. But if the creditor on his bill in equity, instead of a decree to foreclose, obtains a decree for a sale, and the mortgaged estate sells for less than the debt, the balance may be recovered in an action on the covenant or bond, without opening or affecting such a decree for a sale, by which the pledge itself is not taken as a satisfaction, as by a decree to foreclose.”³

33. In Ohio, where the mortgaged premises are sold under judicial proceedings against the mortgagor, and purchased by the mortgagee ; a reversal of the judgment revives the mortgagor’s right of redemption.⁴

34. In Iowa, where an action was brought to recover an instalment due upon a mortgage note, and for non-payment of a previous instalment the plaintiff had foreclosed by taking possession, and the time for redemption had expired before this suit was brought ; held, the suit did not open the

¹ The Globe, &c. v. Lansing, 5 Cow. 380.

² Osborne v. Tunis, 1 Dutch. 633.

³ Per Bland, Chancellor, Andrews v. Scotton, 2 Bland, 666.

⁴ Hubbel v. Broadwell, 8 Ham. 120.

foreclosure; that the proceeding to foreclose was for the instalment then due, — the amount sued for in this case not having been due at that time, — and that the amount then found to be due by that adjudication was not open for investigation in this case. Held, also, that the plaintiff, having foreclosed by taking possession, instead of by sale, should only be held for the value of the premises so entered upon, and *pro tanto* the defendant was entitled to a credit on the mortgage.¹

35. Where a second mortgagee takes a conveyance of the land from another person, holding a first and a third mortgage, after the latter has entered under and foreclosed the first and third mortgages; it is no defence to a suit by the second mortgagee upon his note, that the land and its rents and profits are of greater value than the aggregates of the amounts secured by all the mortgages; because the plaintiff has acquired an absolute title to the land, wholly independent of the second mortgage.²

36. Where several notes are secured by one mortgage, but only one of them is due at the time of the mortgagee's entry, and a foreclosure takes place; such foreclosure shall operate as a payment of this particular note.³

37. February 16, 1836, the plaintiff conveyed certain land to the defendant, taking back for the price four notes, secured by mortgage of the land, and payable at different times. February 22, 1837, this action (of assumpsit) was commenced and property attached upon the note, which was payable in one year, being the second of the four notes. April 12, 1837, the plaintiff entered for foreclosure, and by a year's possession the mortgage was foreclosed. At the time of entry, the first note had been paid, and the value of the land exceeded the amount of the second note, the interest on the others, and the costs of this suit. Held, the action could not be maintained, the facts amounting to payment of the note.⁴

¹ *Wilson v. Wilson*, 4 Iowa, 309.

² *Hedge v. Holmes*, 10 Pick. 380.

See *Farnum v. Metcalf*, 6 Cush. 46.

³ *Hunt v. Stiles*, 10 N. H. 466.

⁴ *Ibid.* 469.

The Court say : — “ Where several notes have fallen due prior to an entry to foreclose, we are not prepared to say that a special entry may not be made for the purpose of foreclosing the mortgage upon a particular note. This, however, is questionable ; as the consecutive order of the notes connected with the lien may so determine the order of payment as to prevent any change in this respect by the mortgagee. But where only one note has fallen due, an entry to foreclose must be upon that note. In this case, the first note had been paid. The second note had fallen due prior to the entry, and the third note became due a few months before the foreclosure. The entry to foreclose could only have relation, then, to the second note ; and the payment received is necessarily upon that note.” The Court further remark : — “ It is now said that there is an attachment made of other property, sufficient to pay this note, and if it is paid by the mortgaged property the attachment will be lost, and that the remaining notes cannot be collected. If this is so, the misfortune is that the mortgagee, in pursuing his double remedy at his own election, has perfected his mode of payment by the land in the first instance. If he had other means of collection, of which he might have availed himself more to his interest, he should have seen to this. But payment having once been made, all other liens must cease. It is too late for him now to reverse the order of his proceedings, and appropriate the funds received to the payment of either note, at his election ; or, rather, the election has already been made, and payment perfected under it, and the state of facts cannot now be changed.” ¹

¹ Hunt v. Stiles, 10 N. H. 469, 470.

CHAPTER XXXVII.

SALE, ETC., OF EQUITIES OF REDEMPTION ON EXECUTION.

1. Equity of redemption liable to be taken on execution.

5. Statutory provisions of the several States upon this subject; miscellaneous decisions as to the mode of levying executions.

22. Whether an equity of redemption shall be sold, or *set off* by appraisement; how the mortgage shall be estimated in an appraisement; defects and errors in this respect.

28. Effect of the sale of an equity of redemption, where the mortgage has been extinguished.

34. Mode of levying in case of a fraudulent mortgage.

37. Whether a levy may be made upon a portion of the mortgaged premises.

40. Effect of the officer's deed to a purchaser; whether registration is necessary to pass a title.

43. Whether the mortgagor can defend against a suit for the land, and on what grounds.

48. Redemption of an equity of redemption sold on execution.

64. Nature of the title remaining in the mortgagor after a sale on execution; whether liable to legal process or voluntary transfer.

67. Mode of proceeding in case of several processes against the same debtor; disposition of the proceeds of sale, &c.

76. Whether seisin of the mortgagor is necessary, to authorize an execution sale of his right.

78. Right of redeeming subsequent mortgages; whether liable to be taken on execution.

79. Miscellaneous points.

1. HAVING in the last chapter considered the subject of a *foreclosure sale*, made *for the benefit of the mortgagee*, the natural order of subjects leads to a consideration of another mode of foreclosing the equity of redemption by process of law, but *for the benefit of third persons*, not parties to the mortgage; subject, of course, to the rights of the mortgagee; to wit, *a sale at law by execution*. As has been already stated, (*supra*, ch. 15,) the right of a mortgagor to redeem the mortgage is almost universally liable, in the United States, to be *taken on execution by his creditors*. (a) This

(a) See *Curtis v. Root*, 20 Ill. 53; *Knight v. Fair*, 9 Cal. 117; *Perry v. Hayward*, 12 Cush. 314; *Pratt v. Skolfield*, 45 Maine, 386; *Harwell v. Fitts*, 20 Geo. 723; *Lenox v. Lotrebe*, 1 Hemp. 251; *Thompson v. Parker*, 2 Jones, Equ. 475; *Woods v. Gilson*, 17 Ill. 218; *Reed v. Diven*, 7 Ind. 189.

It has been held in Mississippi, that an equity of redemption, whether

liability seems to be a necessary incident to, or consequence of, the principle, that the mortgagor, until foreclosure, and as to third persons, remains *the owner of the land*, while the mortgagee has a mere *lien*, not subject to legal process.¹

2. The *possession* of the mortgagor is held not to be necessary to a levy on the equity, unless some other person has adverse possession.²

3. Though a mortgage is made by an absolute deed and defeasance back, the grantor's right of redemption is subject to sale on execution. Thus, in case of an absolute deed to secure a loan, with a defeasance back, the grantee sold the land, and it was afterwards sold upon an execution against the first vendor. The execution purchaser brings ejectment against the second grantee. Held, the plaintiff merely took the right to redeem, on payment to the defendant of the original debt.³

¹ See *Farmers', &c. v. Commercial*, &c. 10 Ohio, 71; *Hunter v. Hunter*, Walker, 194; *Watkins v. Gregory*, 6 Blackf. 113.

² *Watkins v. Gregory*, 6 Blackf. 113.

³ *Kerr v. Davidson*, 10 Ired. 269.

before or after condition broken, is not subject to sale on execution, unless the whole debt has been paid. *Boarman v. Catlett*, 13 Sm. & M. 149; *Thornhill v. Gilmer*, 4, 153. See *Wolfe v. Dowell*, 13, 103; *Henry v. Fullerton*, *Ib.* 631.

In Ohio, where one has conveyed by an absolute deed, with an agreement by the grantee to reconvey upon repayment of the purchase-money and interest within a certain time; a creditor of the vendor, in order to obtain a sale of the land, must first tender this amount to the vendee. *Marshall v. Stewart*, 17 Ohio, 356.

Where a mortgage is for a term of years, leaving a legal reversion in the mortgagor, the reversion in fee will be legal assets. The judgment at law will be only of assets *quando acciderint*, but the creditor may, by bill in equity, compel the heir to sell the reversion, even, it seems, if expectant on an estate tail. Coote, 81.

It is doubtful whether chancery has jurisdiction of a bill in favor of an incumbrancer, for an injunction against a sale under an execution levied on the property. *Byrne v. Anderson*, 10 S. & M. 81.

In Texas, equities of redemption are subject to execution, except where the mortgage is given to secure the purchase-money of the land. *Ballard v. Anderson*, 18 Tex. 377. They are thus liable, notwithstanding a power of sale in the mortgage. *Wootton v. Wheeler*, 22 Tex. 338.

4. It has been held that, where one person conveys land to another, upon trust to secure the payment of a note, due from the grantor to a third person, with power to sell on failure of payment, and with condition to be void upon payment, the interest of the grantor is liable to be taken on execution.¹ But, in Ohio, a deed of trust made to secure a debt, and so drawn as for most purposes to constitute a mortgage, passes the legal title, and leaves nothing in the grantor subject to execution.²

5. In most of the States, the statutory law provides generally for the mode of levying execution upon *real property*, including, of course, equities of redemption. It is foreign from the plan of the present work to state these provisions in detail, as they do not specially pertain to the subject of *mortgages*. (*b*) It need only be remarked, that the course of proceeding is very various in the different States: in some, real property being *sold* on execution, like chattels; in others, *extended* or *set off* to the creditor, by appraisement; and in others, the one or the other of these methods being adopted, according to circumstances. The practice last named (*extent*) prevails in Massachusetts, (*c*) Pennsylvania, Delaware,

¹ *State v. Lawson*, 1 Eng. 269.

² *Morris v. Way*, 16 Ohio, 469.

(*b*) Late statutes in the several States may have materially modified the law which has hitherto prevailed upon this subject. Obviously, however, the statutes themselves are the only safe guide upon a matter so entirely local, and running so much into detail. It is therefore deemed unnecessary to inquire with more particularity into the statutory provisions, if such there are.

(*c*) In this State, the advertisement of the sale of an equity should specify the place of sale. But a false return, that the place had been specified, is conclusive between the creditor and debtor, and those claiming under them. *Whitaker v. Sumner*, 7 Pick. 551.

The officer's notice of such sale need not contain a particular description of the land. A general one is sufficient. *Pomeroy v. Winship*, 12 Mass. 514.

Where an execution against a deceased person is levied on a right in equity, the notice should be given to the executor or administrator, not the heirs. *Atkins v. Sawyer*, 1 Pick. 351.

New Jersey, North Carolina, Alabama, Tennessee, Illinois, Kentucky, Indiana, Ohio, Michigan, Arkansas, Mississippi, and perhaps some other States. In Maryland, South Carolina, Georgia, New York, Missouri, and perhaps other States, real estate is *sold* on execution. In Vermont, equities of redemption are either sold or set off. In the other New England States, it would seem that they are appraised and set off.¹ (*d*)

¹ See Hill. on R. P. ch. 100.

Sunday is not to be reckoned as one of the three days for which such sale may be adjourned. *Thayer v. Felt*, 4 Pick. 354.

In Maine, if the purchaser of an equity of redemption, sold on execution, has satisfied and paid the mortgage, the mortgagor, or those claiming under him, having redeemed the equity of redemption within one year after such sale, may redeem such mortgaged estate, within the time and in the manner he might have redeemed it of the mortgagee, if there had been no such sale. Rev. Stat., Maine, 1857, c. 89.

In the same State, levies may be made on lands mortgaged as on lands not mortgaged, and the amount due on the mortgage deducted by the appraisers. If the full amount due was not deducted, or if the levy was made in the usual form, and it is ascertained that there was a mortgage on the premises, not including other real estate, and not known to the creditor at the time of levy; he may recover of the debtor the amount due on such mortgage.

Such levies may be redeemed within one year, as in other cases. When the debtor pays on the mortgage after the levy, and does not redeem, he may recover the amount so paid of the creditor, in an action for money had and received.

Rights of redeeming real estate mortgaged may be taken on execution and sold, and the officer shall account to the debtor for any surplus proceeds of the sale, to be appropriated as provided in section 21 of chapter 84.

When a right of redemption has been attached, judgment recovered, and a sale of it is to be made, the creditor may demand of the mortgagee to disclose, in writing under his hand, the condition of the mortgage and the sum due thereon, which shall be furnished within twenty-four hours; and, in case of neglect, he shall be liable for damages.

If such disclosure is not furnished within that time, the creditor may apply to any magistrate, authorized to take depositions, for relief. Rev. Stat. of Maine, chap. 76, p. 463.

(*d*) In New Hampshire, an attachment of real estate gives a lien upon

6. Numerous questions have arisen, with reference to the mode of levying executions upon equities of redemption; the proper disposition of the proceeds of such levies; and their effects upon the respective rights of the mortgagor, the mortgagee, and the execution purchaser. It will be seen, that, in some of the cases cited, the property has been levied on, either by mistake or design, without reference to an existing incumbrance. In others, occurring in those States where real property is liable to *attachment* upon the original writ, as well as sale on execution; a mortgage existing at the time of attachment has been extinguished before the levy, thus raising a doubt whether the execution is to be levied as upon incumbered or unincumbered property. On account of the diversity of statutory regulation and established practice upon the subject in the different States, the decisions are of a miscellaneous character, and it is difficult to deduce from them any principles universally applicable.

7. In South Carolina, it has been held, that where a *fi. fa.* is delivered to an officer, with orders to execute it by levy and sale of the debtor's lands, the sheriff is not bound to search the public offices, to ascertain whether the property is mortgaged, nor to sell by virtue of any mortgage, but may sell subject to all incumbrances.¹

8. In the same State, an execution purchaser of mortgaged land takes the place of the mortgagor in all his rights and duties.²

9. So in Connecticut, the seizure, appraisal, and setting

¹ Comm'rs, &c. v. Hart, 1 Brev. 492.
See Bennett v. Calhoun, &c. 9 Rich.
Equ. 163.

² State v. Laval, 4 McC. 336.

the debtor's right of redeeming from execution or tax sales. The creditor has a right to discharge any incumbrance, and either he or the officer may demand a statement of its amount. Unless furnished in fifteen days, or if untrue, the incumbrance is discharged. After payment, if the attachment is defeated, the creditor may claim a conveyance from the incumbrancer of his title, and, if not made, may recover back the sum paid. If such convey-

off of an equity of redemption to the creditor, on execution, vests in him all the rights of the mortgagor.¹

10. In the same State, if the value of the equity does not exceed the amount of the execution, the whole may be taken, and the mortgagor's right will be extinguished. But if the value exceeds the amount of the execution, the latter must be levied on an undivided part, sufficient to satisfy it; and the creditor and mortgagor will then become tenants in common. The levy must be made on the equity, not on the land, the fee being in the mortgagee.²

11. In New Hampshire, it has been held, that the proper mode of applying an equity of redemption to the satisfaction of the mortgagor's debts, is by attachment and sale of the equity as such. But a levy, disregarding the mortgage, is valid against the mortgagor, but does not affect the rights of the mortgagee.³

12. In Vermont, it is held, that in a levy upon mortgaged premises the amount of the mortgages should be stated.⁴

12 *a.* If the debt exceed the appraised value of the equity, the creditor is nevertheless not bound to levy upon the entire interest of the debtor, but may levy, for a portion of his debt, upon an undivided part of the debtor's interest.⁵

12 *b.* So, though the execution of another creditor, for a portion of the debt contained in his execution, is at the same time levied upon the residue of the debtor's interest, thus making the two creditors tenants in common of the entire equity.⁶

13. In Pennsylvania, under a *fi. fa.*, an inquisition must be held on lands, though mortgaged; a *venditioni exponas* without it is irregular.⁷

¹ Punderson v. Brown, 1 Day, 93.

² *Ib.*; Hinman v. Leavenworth, 2 Conn. 244; Scripture v. Johnson, 3, 211; Hobart v. Frisbie, 5, 592; Phelps v. Ellsworth, 3 Day, 397.

³ Kelly v. Burnham, 9 N. H. 20.

⁴ Swift v. Dean, 11 Verm. 323.

⁵ Kimball v. Smith, 21 Vt. 449.

⁶ *Ibid.*

⁷ Naples v. Minier, 3 Penn. 475.

ance is made, the debtor is notified and may still redeem. Any change in the title of a debtor to lands attached has no effect upon the attachment, but his whole interest is bound thereby. N. H. Rev. Sts. 368, 369.

14. In the same State, a parol agreement, at the time of a sheriff's sale under a judgment, between one holding a mortgage prior to the judgment, and one who contemplated purchasing the land, that the mortgage might remain a lien, and that the purchaser should be required to pay only the surplus of the purchase-money over the mortgage, is not binding upon one claiming under such purchaser without notice.¹

15. In the same State, it is held, that land may be sold on execution, subject to a mortgage, though not the first incumbrance, if it be so understood and agreed by the purchaser at the time of sale.²

16. In North Carolina, if mortgaged premises are sold, upon an execution against the mortgagor, for more than the amount of the execution; the mortgagee is entitled to the surplus.³

17. In Ohio, lands mortgaged since June, 1805, must be sold on execution in the manner prescribed by the execution law at the time of sale.⁴

18. In Kentucky, an execution sale of land, as the absolute property of the debtor, will pass all the interest that he has, subject to the execution; as an equity of redemption where the land is mortgaged.⁵

18*a*. The statute, which subjects property mortgaged to be sold under execution, expressly provides that the same shall be sold as if no incumbrance existed. (1 Stat. Law, 653.) And therefore a sale of lands and slaves, under a mortgage, should be a separate one, as though there was no mortgage in existence, and selling them in gross is illegal, and the sale is a nullity.⁶

19. In Louisiana, where a sheriff seizes, advertises, and sells, "all the right, title, and interest of the debtor in a lot of ground" owned by him, but subject to mortgages; the seizure and sale is of the property itself, not of the debtor's interest after the mortgages are paid.⁷

¹ *Roberts v. Williams*, 5 Whart. 170.

² *Tower's, &c.* 9 W. & S. 103.

³ *Jones v. Thomas*, 4 Ired. 12.

⁴ *Allen v. Parish*, 3 Ham. 526.

⁵ *Dougherty v. Linthicum*, 8 Dana,

194. See *Brace v. Shaw*, 16 B. Mon. 43; *Mercer v. Tinsley*, 14, 273.

⁶ *Lee v. Fellowes*, 10 B. Mon. 117.

⁷ *Trudeau v. McVicar*, 1 La. Ann.

R. 426.

20. In Alabama, when a sheriff levies upon land, which he afterwards finds to be incumbered by mortgage, he is bound to make a further levy, unless there is reason to expect that the property will bring enough to satisfy the execution.¹

21. In Maine, if a creditor extend his execution on land mortgaged for more than its value, not knowing of the mortgage, though long recorded; he may have an *alias* execution and satisfaction from other estate, agreeably to the Stat. of 1821, c. 210.²

22. In Massachusetts it has been held, that, where an execution is *extended* upon property subject to mortgage, and in the appraisal no deduction made for such mortgage; the creditor acquires a good title as against the debtor and those claiming under him, if he is willing to take it as clear from incumbrance. In the case of *Warren v. Childs*,³ Sewall, C. J., expressed a doubt, whether the provision by statute for selling equities on execution did not supersede the levy by extent and appraisement. He, however, seems to admit that this mode may be pursued, if no deduction is made in the appraisement for the mortgage. And in the case of *White v. Bond*,⁴ this principle was distinctly settled, and the demandant in a real action, claiming under such a levy by appraisement, recovered judgment against the tenant who claimed under a similar subsequent levy, made after the mortgage debt was paid. (e)

¹ *Governor v. Powell*, 9 Ala. 83. See ³ 11 Mass. 222.

Paulling v. Barron, 32 Ala. 9.

⁴ 16 Mass. 490; acc. *Hovey v. Bart-*

² *Steward v. Allen*, 5 Greenl. 103. lett. 34 N. H. 278.

(e) By the Revised Statutes. (pp. 468, 469: see also Gen. Stats.) equities of redemption may be set off, like unincumbered real estate, at the election of the creditor: the amount of the mortgage being deducted in the appraisal. If after a levy there proves to be a mortgage, not known or allowed for by the appraisers, the levy shall still be good against the debtor, and the creditor in a new action may recover the amount paid on the mortgage. The same redemption is allowed as in case of unincumbered property. If the creditor pays the mortgage debt, the mortgagor may redeem the mortgage

23. In the case of *Litchfield v. Cudworth*,¹ an execution against the owner of an equity of redemption was extended on the land, and the return stated that *the debtor's right* in the premises was appraised, but not that the mortgage was disregarded in making the appraisal. Held, for this omission, the extent was void. Morton, J., remarks:² — “The estate being under mortgage, the equity of redemption only could be taken on execution. The mode of levying upon equities is prescribed by Stat. 1798, chap. 77, sec. 3 & 4. That this is the most proper mode cannot be doubted; and it was at first very questionable whether it did not supersede every other mode. And even now it may be considered doubtful, whether the judgment creditor, knowing of the existence of a valid incumbrance, may have his election to sell the equity of redemption by auction, or to extend upon the land by appraisal, without regard to the incumbrance. But as it sometimes may happen, that mortgages may exist without the knowledge of the creditor, or that he may not know whether they are genuine or fictitious, or may suppose that the incumbrances have been removed, or may desire to contest them on the ground of fraud or collusion, it has been holden, that he may extend his execution upon the whole estate, by an appraisal of its full value. Such a levy will pass all the debtor's interest. But an equity of redemption, as such, cannot be taken in this form. If the amount of the incumbrance be deducted in the appraisal, the levy will be void. And this rule is founded upon good reasons. For the mortgagor may voluntarily remove the incumbrance, or

¹ 15 Pick. 23.

² *Ib.* 27.

as he might have done from the mortgagee, if the execution had not been levied. If he does not thus redeem, the creditor shall hold the premises as assignee of the mortgage, free from redemption, though the debtor have redeemed, or offered to redeem, the right levied upon. If the debtor does not redeem such right within the year, the creditor shall hold the premises against him, though he has redeemed, or offered to redeem, the mortgage. An over-appraisement avoids the levy. *McGregor v. Williams*, 10 Cush. 526.

may be compelled on his personal security to pay the debt, and thus the creditor may get the estate relieved of an incumbrance which was considered in the appraisal. As this is a statute mode of conveyance, all the requirements of the statute must not only be complied with, but this must appear in the return itself. It should appear with reasonable certainty that the whole estate, and not the equity of redemption, was appraised. The return does not show this. The appraisal was of the debtor's *right* in the premises, which would apply quite as well to the debtor's interest in the equity, as to his portion of the land itself, and renders it doubtful whether the incumbrances were not deducted, and indeed probable that they were."

24. In the case of the *Mechanics' Bank v. Williams*,¹ an execution was extended on mortgaged land, and the appraisers certified, that they appraised *the estate* at a certain sum, at which it was set off. Held, the extent was valid, as it was to be inferred that no deduction was made by the appraisers on account of the mortgage. Shaw, C. J., says :² "As against all the world but the mortgagee, the equity of redemption is an estate, subject only to an incumbrance or lien, and may be conveyed by any of the modes of alienation, subject only to the incumbrance. The incumbrance may be small, and the creditor may choose to disregard it ; or he may have reason to believe that the mortgagee intends to look to other security ; he may prefer an estate in freehold to himself to an auction title from an officer, even at the expense of discharging the incumbrance, or he may intend to contest the validity or the amount of the mortgage. The other mode, that of a sale of the equity, is intended for his benefit, but it is a benefit which he may waive."

25. Where fifty acres of land were conveyed, on condition that the grantee should pay a mortgage made by the grantor on ten acres and on other land of the grantor ; held, in extending an execution against the grantee on the fifty acres,

¹ 17 Pick. 438.

² *Ib.* 440.

the appraisers might deduct from their value the whole mortgage debt, though such deduction exceeded the value of the ten acres.¹

26. In extending an execution upon mortgaged land, appraisers may deduct all the interest which the judgment debtor is liable to pay on the mortgage debt, though a part of it has been paid to the mortgagee by a third person, at the request of the judgment debtor's assignees under the insolvent law, but not at the request or with the assent of the debtor.²

27. In 1830, Woodbury mortgaged to Chase a tract of land containing fifty acres, embracing the lands afterwards, in 1838, conveyed to Holbrook, containing about ten acres. October 4, 1839, Holbrook conveyed this portion to Brown, one of the plaintiffs, but the deed was not recorded till April, 1840, before which time the premises were attached by the defendants, and afterwards taken on execution and set off to them in satisfaction thereof. In 1842, Chase assigned her mortgage to the defendants. By the levy of the execution, the premises were estimated at \$7,300, from which was deducted \$1,641.17, the whole amount of the Chase mortgage, and \$124 for an incumbrance upon a certain water privilege. The plaintiffs, Brown, and the others claiming under him, bring a bill in equity, praying to redeem the Chase mortgage upon payment of the amount due thereon, and denying the validity of the levy. Held, the plaintiffs were entitled thus to redeem: that the levy was void, because the whole amount of the Chase mortgage was deducted, instead of Holbrook's proportional part, upon an estimate of its relative value, as compared with the remaining forty acres.³

27 *a*. The execution debtor, or those who claim under him, cannot object to a levy upon his equity of redemption, on the ground that the mortgage debt was stated in the officer's return at less than the true amount; this error not operating an injury to the debtor, but to the creditor.⁴

¹ *Jenks v. Ward*, 4 Met. 404.

² *Ibid.*

³ *Brown v. Worcester Bank*, 8 Met. 47.

⁴ *Slocum v. Catlin*, 22 Verm. 137.

28. In the case of *Forster v. Mellen*¹ it was held, that, where the estate of a mortgagor has been *attached* upon the writ, the mode of levying an execution upon the property is to be determined by its situation at the time of such attachment; and if at that time the mortgage was extinguished, though before the levy a new one has been made, a levy as upon an equity of redemption is void. But in the later case of *Freeman v. McGaw*² it was held, that, as an attachment merely fixes a *lien* on the property, without transferring the title or affecting the nature of the estate; "the mode of levy, the act by which a title is to be transferred, it would seem, must be determined by the nature of the debtor's title at the time of the levy, and not at the time of the attachment. The equity of redemption being in fact gone, it would be absurd to pursue a mode solely applicable to a subsisting equitable estate, which no longer exists." These remarks were made by the Court without reference to any statutory provision, but it was further considered, that the case was provided for by an express statute. (*f*) In a very late case it is held, that a levy as upon an equity of redemption after payment of the mortgage is void, though neither the creditor nor officer had notice of such payment.³

29. In •Maine it has been held, that the sale of an equity of redemption is void, if the land was unincumbered at the time of service of the execution.⁴ The levy should be as upon an unincumbered estate.⁵ (*g*)

30. In another case it is held, that the question, whether an execution shall be *levied*, as upon an equity of redemp-

¹ 10 Mass. 421; acc. *Tufts v. Hayes*,
11 Fost. 138.

² 15 Pick. 83, 84.

³ *Grover v. Flye*, 5 Allen, 543.

⁴ *Pillsbury v. Smyth*, 25 Maine, 427.

⁵ *Jewett v. Whitney*, 43 Maine, 242.

(*f*) See Mass. Rev. Stat. 550. Also Gen. Stats.

(*g*) In the same State, by a late statute, the right in equity of redeeming lands mortgaged, and the right of redeeming such right or equity of redemption after it is sold on execution, may be attached like tangible property. Rev. Stat. of Maine, p. 506.

tion, or *extended* by appraisement of the land, depends upon the state of the title at the time of seizure. The subsequent proceedings relate back to that time. A discharge of the mortgage, subsequent to the seizure of the equity, and prior to the appointed day of sale, does not take away the right to sell the equity.¹

31. In the same State, where land is attached, and there proves to be an unrecorded mortgage upon it, there must be a levy on the fee, not a sale of the equity, in order to prevail over the mortgage.²

31 *a*. The levy of an execution by extent, upon an equity of redemption attached, passes the title which the debtor had at the time of attachment.³

31 *b*. The purchaser of an equity of redemption, sold on execution, which had been attached on the writ, takes a right of immediate possession, which enables him to maintain trespass *quare clausum*, against a party claiming under a conveyance made by the party since the attachment.⁴

31 *c*. In such case, the estate passes to the purchaser from the day of the sale, although the officer's deed be not made on that day, if it be made so soon afterward as to form part of the same transaction.⁵

32. In Kentucky, if there is a sale of an equity of redemption, when the mortgage debt has been paid, no title passes by such sale.⁶

33. In Georgia it is held, that, where a mortgage upon land taken on execution is on record at the time of the judgment, only the equity of redemption can be taken. Hence the proceeds of sale go to the creditor, not to the mortgagee.⁷

34. A mortgage made *to defraud creditors* is as to them void, and creates no equity of redemption liable to be taken on execution. Such a mortgage having been made, a creditor of the mortgagor attached his right of redemption; pending which attachment, another creditor extended an execution

¹ Bagley v. Bailey, 4 Shepl. 151.

² Nason v. Grant, 8 Shepl. 160.

³ Abbott v. Sturtevant, 30 Maine, 40.

⁴ Ibid.

⁵ Dougherty v. Linthicum, 8 Dana, 194.

⁷ Jewitt v. McGowen, R. M. Charl.

⁶ Ibid. 391.

upon the land, as unincumbered property. The equity of redemption was afterwards sold on execution, in completion of the attachment, to an innocent purchaser. The levying creditor brings a suit for the land against the execution purchaser. Held, the action should be maintained, the execution sale being void, because no equity of redemption was created by the mortgage. If the defendant had claimed by a direct purchase from the mortgagor, he would have taken the land free of incumbrance, as an innocent purchaser. But, claiming by a *statute title*, he must prove everything necessary to constitute such title. When the statute authorizes the sale of an equity of redemption, it contemplates a *valid* mortgage. Moreover, a creditor may levy upon the land of his debtor, and thereby acquire as good title as the latter had therein; and, in regard to his creditors, a fraudulent grantor has a perfect title. Nor can one creditor, by attaching an equity of redemption, and thereby recognizing the mortgage as valid, deprive others of the right to treat it as void, by seizing the land itself.¹

35. In the case of *Russell v. Dudley*,² after a mortgage by the defendant, a creditor attached all his "right in equity" to redeem the land; and, upon an execution subsequently taken out in the suit, said "right in equity" was advertised, sold, and duly conveyed to the demandant, who bought for the creditor's benefit. Previous to the sale, but after the seizure on execution, the mortgagees took possession for the purpose of foreclosure, and leased to the defendant for one year. At the trial, the demandant alleged that the mortgage was made to defraud creditors, and the question was raised, whether evidence of this allegation was competent. Held, such evidence was not competent, and that the action could not be maintained. Shaw, C. J., says:³ — "It was at the option of the creditor to treat the mortgage as an invalid conveyance, and set off the estate in fee, at an appraisement, wholly re-

¹ *Bullard v. Hinkley*, 6 Greenl. 289.
See *Perry v. Hayward*, 12 Cush. 344;
Verry v. Richardson, 5 Allen, 107.

² 3 Met. 147.

³ *Ib.* 148.

gardless of the mortgage ; or to treat the mortgage as valid and effectual, and sell the right of redemption at auction. The proceeds of the sale might be sufficient to satisfy his debt, without disturbing the mortgage. But he could not do both. He could not treat the mortgage as subsisting, so as to warrant a sale at auction under the statute, and then, when he had taken his deed, treat the mortgage as a nullity, and claim the estate in fee. It is true, the attachment and sale are not merely of "a right to redeem," but of the estate of the debtor, subject to the mortgage. But the demandant claims under a statute title, an officer's deed, by which nothing passes, unless all the circumstances concur in establishing the case on which the power is given. If there was no mortgage, there was no equity of redemption ; the creditor had no right to cause the estate to be sold at auction ; and the officer's deed was inoperative and void. The creditor, by treating it as a subsisting mortgage, is afterwards estopped to deny the existence of such mortgage ; and the demandant, purchasing for the use of the creditor, and taking with a knowledge of all the facts, is likewise estopped. But regarding the demandant as a *bonâ fide* purchaser, without notice, what are his rights ? He purchased the premises at a sheriff's sale, as an equity of redemption, or as an estate subject to some mortgage ; otherwise the officer had no power to sell, and nothing passed by his deed. But there was no other mortgage, except the mortgage now in question. He therefore took the estate subject to that mortgage, and is as much estopped to contest it, as if it had been recited in his deed. And this result would be as conformable to equity as to law. The purchase-money must be understood to be the value of the estate, over and above the sum for which it is mortgaged. If (the purchaser) could afterwards avoid that mortgage and hold the whole estate, he might get it for a very inadequate consideration ; he would get what the officer never intended to sell, to the manifest injury of the debtor, and perhaps of the creditor. It would be injurious to the debtor, by taking the whole of his estate by force of a legal proceeding, in-

tended to convey to him the balance of the value of the estate, after paying the mortgage debt, leaving the debtor still personally liable for that debt. It would be injurious to the creditor, if the actual proceeds of the sale should prove insufficient to pay the whole amount of his execution; as it would be giving to the purchaser the power of defeating the intermediate mortgage, which it is the privilege of the creditor alone to impeach, for his own benefit; and which, if set aside, would leave the whole value of the estate to be applied to the satisfaction of the execution."

36. In the case of *Van Deusen v. Frink*,¹ a second mortgagee took an assignment of the first mortgage, and procured from the mortgagor a release of the equity of redemption. Subsequently, a creditor of the mortgagor levied on the equity of redemption, and purchased it at the sheriff's sale, and now brings a bill in equity to redeem the second mortgage. Held, the plaintiff might prove that the second mortgage and the release were fraudulent and void as against him, by showing fraud practised on the mortgagor by the defendant, though the mortgagor himself had made no attempt to avoid them. Shaw, C. J., remarks:² — "The plaintiff combined in himself both characters, that of a creditor of Deming and that of a purchaser of the equity of redemption. In the former, he had full power to set aside and avoid all mortgages, conveyances, and incumbrances of every description, made by Deming, through fraud and covin, to delay and defraud the creditors of Deming. In the latter character, as purchaser, he had by force of the statutes all the power and authority to redeem, which Deming himself had before the sale."

36 *a*. Where an equity of redemption is attached, as having been conveyed in fraud of creditors; the execution purchaser may maintain a bill in equity to avoid the conveyance and redeem the mortgage.³

36 *b*. In case of a fraudulent mortgage and another subsequent valid mortgage, a creditor of the mortgagor may

¹ 15 Pick. 449.

² *Ibid*, 458.

³ *Gerrish v. Mace*, 9 Gray, 235.

levy an execution upon the property, although the mortgagor has conveyed his right of redeeming both mortgages. The execution being less in amount than the second mortgage, that mortgage is valid in reference to the grantee of the equity.¹

37. In Maine, where land lying within adjoining towns is included in the same mortgage, an officer may lawfully advertise, sell, and convey the right of redeeming that in one of the towns only; and thereby give to the purchaser the right to redeem the mortgage by an entire performance of the condition.²

38. In Vermont, the levy of an execution upon a portion of mortgaged premises, described by metes and bounds, is void.³

39. In the same State, if an execution is levied upon mortgaged premises, and the debt exceeds the appraised value of the equity of redemption; the execution may still be levied, for a portion of the debt, upon an undivided part of the debtor's interest. His whole interest need not be taken.⁴

40. In Massachusetts, a deed of an equity of redemption, given by an officer to a purchaser thereof at an execution sale, pursuant to the Revised Statutes, c. 73, § 38, passes all the debtor's right, title, and interest in the premises as against a subsequent purchaser or attaching creditor having actual notice, though such deed be not recorded within three months.⁵ (*h*) But, in general, registration is necessary to the validity of the levy, even though the property was seized before the statute requiring such levy took effect.⁶

¹ *Verry v. Richardson*, 5 Allen, 107.

⁴ *Kimball v. Smith*, 21 Verm. 449.

² *Franklin, &c. v. Blossom*, 10 Shepl. 546.

⁵ *Houghton v. Bartholomew*, 10 Met. 138.

³ *Swift v. Dean*, 11 Verm. 323.

⁶ *De Witt v. Harvey*, 4 Gray, 486.

(*h*) The following observations illustrate the condition of the title to an estate, where the right of redemption has been sold on execution, with reference to the respective rights of the mortgagee, mortgagor, and purchaser.

41. Pending a suit, in which an equity of redemption was attached, the same right was attached in a suit brought in the name of one person for the benefit of another, who afterwards went into insolvency. The first attaching creditor recovered judgment, and perfected his attachment by a sale on execution. The officer gave a deed of the equity, but it was not recorded within three months. Judgment was afterwards recovered in the second suit, and the equity again sold on execution, and conveyed by the officer to the assignee of the second judgment creditor. Held, if before the second levy and sale, and before the appointment of the purchaser as assignee, the insolvent had actual knowledge of the first levy, sale, and deed, and attachment, or if the assignee had such knowledge after his appointment, and before the second

In *White v. Whitney*, (3 Met. 87,) Shaw, C. J., remarks: — “ Suppose A., holding an estate, protected by covenants of seisin and warranty against all incumbrances, but subject in fact to an outstanding mortgage or to some defect of title, should make a mortgage to B.; afterwards his equity of redemption is attached by C., his creditor, and in due time and in legal form this equity of redemption is sold at auction on execution, and conveyed to D. by an officer's deed; would the benefit of the covenants, under which A. held, pass by his mortgage to B., or by the sheriff's deed to D.? We think this question is answered by saying, to both according to their respective rights in the estate. It is incident to the estate, and inseparably annexed to it. B., the mortgagee, being first in time, would be first in right, so far as necessary to his security as mortgagee; he is deemed seized of the estate, and of course to the same extent that he holds the estate, he is the assignee of the covenant. Should B. enter, to hold under his mortgage, and actually foreclose, he would hold the whole benefit of the covenant; but if D. should pay off B.'s mortgage, as he would have a right to do, this would extinguish the mortgage; he would hold the whole estate, and of course the whole interest in the covenant, as assignee in law. In such case, if suit were to be brought on the covenant before either foreclosure or redemption, there might be a question, who would have a right to sue, or what damages the plaintiff would have a right to recover. It may be added, by way of further illustration, that the purchaser at the sheriff's sale takes a defeasible estate only; the debtor has a right to redeem within a year, and reinvest himself with the estate; and should he do so, he would be reinstated in his right to the covenant of warranty attending it.”

levy and sale; the title of the first purchaser should prevail over that of the second.¹

42. A statute of Maine provided, that the officer's deed of an equity of redemption, sold on execution, should be as effectual to convey it, as if made by the debtor. Held, such deed need not be recorded, in order to pass a title. The Court say: — "When the officer, having previously taken the preliminary steps, sold the equity of redemption, and made, executed, acknowledged, and delivered a deed to the highest bidder; the title of the execution debtor is thereby divested. Publicity of the seizure and sale is by law required to be given in the fullest and most effectual manner. Unless it is redeemed within the time limited, or the sale is abandoned, the same property cannot be again seized by another creditor. The return of the officer on the execution is additional notice to the public of his proceedings. The statute does not make it essential to the validity of the sale, that the officer's deed should be recorded. The eighteenth section provides (as above.) That may be considered as declaring, that these proceedings operate a statute transfer of his title. If the registry of the deed is necessary to put the estate out of the reach of other creditors, or of a subsequent purchaser, it is deducible by construction. It might have the effect to give more perfect notice, if the officer's deed should be required to be recorded. But this is a matter which belongs to the legislative department."²

43. Various questions arise, as to the defence which may be made by the execution debtor against a suit for the land founded upon the levy of the execution. It has been held, — although in that case the property levied on was not itself an equity of redemption, and therefore the decision is inapplicable to the present subject except by analogy, — that where lands have been sold on execution, and the purchaser brings ejectment against the judgment debtor, the defendant cannot set up in defence an outstanding mortgage given by

¹ *Houghton v. Bartholomew*, 10 Met. 135.

² *Rackleff v. Norton*, 1 Appl. 274, 277.

himself, before the judgment lien attached to the land. The Court say : — “ A mortgagor cannot be permitted to disown his legal rights, to the prejudice of his creditors, or to protect himself in the possession and enjoyment of his estate, by admitting the existence of rights in third persons, who do not appear to set them up, which rights cannot be affected directly or indirectly by the success or failure of his defence. The property in the possession of the plaintiff will be as liable, and as sufficient to satisfy the debt, as it will be if it remains with the defendant. If the mortgaged premises be of greater value than the debt for which they are pledged, the plaintiff, by his purchase from the sheriff, is entitled to the difference.”¹

44. And the same estoppel applies to the mortgagee, who has been permitted to come in and defend the suit.² The Court say :³ — “ It seems to us to stand on the same reason with the other cases, in which it is held, that the debtor in execution cannot set up a want of title in himself. As he has had the benefit of the sale in the payment of his debts, he ought not to say that he had nothing in the premises; and he cannot, with truth, say so, as he had, at least, the possession and enjoyment of the land, and those he ought to give up; and to recover them is the object of the ejectment. The same principle applies equally to a case in which the debtor has only an equitable interest. The act of 1812 authorized the sale of an equity of redemption under a *fiери facias*. This act makes the equity of redemption, when sold under execution, a legal interest, to the extent, at least, of enforcing it by the recovery of possession from the mortgagor himself.”

45. So it has been held, that a tenant of the mortgagor, or a purchaser from him by executory contract, cannot dispute the title of the execution purchaser.⁴

46. More especially, where the purchaser of an equity of

¹ Phelps v. Butler, 2 Ohio, 331, 332; Ely v. McGuire, Ib. 330; Davis v. Evans, 5 Ired. 525.

² Davis v. Evans, 5 Ired. 525.

³ Ib. 532, 533.

⁴ Dougherty v. Linthicum, 8 Dana, 194.

redemption, sold on execution, had tendered to the holder of the mortgage the amount due upon it; held, he had acquired a seisin, sufficient to sustain an action for the land against the mortgagor.¹

46 *a.* A., having attached B.'s right to redeem certain real estate, afterwards obtained judgment, sold said right on execution, became himself the purchaser, and subsequently sued out his writ of entry against B. to recover the premises. Held, that B. could not defend himself against the demandant's title under the sheriff's deed, by showing that he was in as tenant of a third person, who, after the commencement of the real action, had acquired the mortgagee's title, and taken possession under the mortgage.²

46 *b.* Where a plaintiff in execution levied it on an equity of redemption, he is estopped to deny that the mortgage was *bonâ fide* and valid, as between mortgagor and mortgagee. But where such plaintiff afterwards bought the absolute title to the mortgaged property at a sheriff's sale, he may show that the mortgage was void as to the subsequent judgment creditor.³

47. In Kentucky, the execution purchaser of an equity of redemption is entitled to possession as against the mortgagor, but cannot maintain ejectment for the land till after the expiration of a year, during which the mortgagor has a right to redeem.⁴

48. In Massachusetts, where an equity of redemption is sold on execution, under the Rev. Sts. c. 73, § 37, the time limited for a bill to redeem such equity, under § 44, is one year from the time of sale.⁵

49. In computing the time allowed by St. 1815, c. 137, § 1, for redeeming such right, which was "within one year next after the time of executing by the officer to the purchaser the deed thereof," the day of executing the deed is to be excluded.⁶

¹ *Porter v. Millet*, 9 Mass. 101.

² *Goodall v. Rowell*, 15 N. H. 572.

³ *McWhorter v. Huling*, 3 Dana, 348.

⁴ *Abel v. Wilder*, 7 B. Mon. 530.

⁵ *Houghton v. Field*, 2 Cush. 141.

⁶ *Bigelow v. Willson*, 1 Pick. 485.

50. If the mortgagor does not within a year redeem his equity of redemption, sold on execution, his whole interest is lost, and he cannot redeem the mortgage, though the purchaser does not redeem.¹ (i)

51. Under the Revised Statutes, (c. 73, §§ 44, 46,) if the purchaser refuse to release the equity, upon a tender by the debtor or his assignee of the sum due him therefor, a writ of entry lies to recover the equity.²

52. A subsequent demand for the money, made by the purchaser, but after dark, is unreasonable, and does not avoid the tender.³

53. An equity of redemption being sold on execution, the purchaser paid the mortgage; and the mortgagee cancelled the note and mortgage, indorsed a discharge on the latter, and delivered them to the purchaser. The Rev. Sts. of Massachusetts provide, (c. 73, §§ 34, 35,) that if an execution creditor shall pay the mortgage debt, the judgment debtor may redeem from him, as he might have done from the mortgagee, and, in case he does not, the creditor shall hold as assignee of the mortgage, and free from redemption, though the debtor redeem or offer to redeem the right taken in execution. Held, under this provision, the purchaser became an equitable assignee of the mortgage.⁴

53 a. Where the purchaser of a right in equity, sold on execution, takes an assignment of the mortgage within a year from the sale, the mortgage does not merge; the debtor still having a remaining right, and the mortgagee, therefore, not having the whole title.⁵

53 b. On a bill to redeem an equity sold on execution, the defendant must account for the rents and profits received by him, though, before suit brought, the plaintiff tendered him the purchase-money and interest, not deducting the rents and profits.⁶ The defendant having after the tender occupied the

¹ *Ingersoll v. Sawyer*, 2 Pick. 276.

² *Hooker v. Hudson*, 19 Pick. 467.

³ *Tucker v. Buffum*, 16 Pick. 46.

⁴ *Gleason v. Dyke*, 22 Pick. 390.

⁵ *Tuttle v. Brown*, 14 Pick. 514.

⁶ *Tucker v. Buffum*, 16 Pick. 46.

land under a lease from the mortgagee, at a low rent, and afterwards purchased the mortgage; held, he should account for the fair annual value.¹ So the plaintiff must account for the interest, if any, received by him on the money tendered to, and refused by, the defendant.² The defendant was allowed a commission of five per cent. on rents collected by him.³ So where the defendant, the execution purchaser, being in possession, took a lease from the mortgagee, made repairs and improvements, and afterwards bought the mortgage; held, he should be allowed the cost of the repairs and improvements.⁴

54. In Maine, where the execution purchaser redeems the mortgage, and within the year the mortgagor redeems the equity, the latter may redeem the mortgage from the former, as he might from the mortgagee.⁵

55. If a judgment creditor extend his execution on land mortgaged for the same debt, and the debtor fail to redeem for a year after the extent, the creditor acquires an absolute estate, notwithstanding the mortgage.⁶

56. A statute of New York provided, that where land subject to mortgage is sold on execution against the mortgagor, the mortgagee may redeem within fifteen months, by paying the amount of the bid and seven per cent. interest. Held, the act did not apply to the assignee of a mortgage, executed by a purchaser from the execution defendant.⁷

57. Where an equity of redemption is attached, and afterwards sold on execution, and between such attachment and sale the mortgagor has made a second mortgage, the second mortgagee or his assignee may redeem from the execution purchaser.⁸ Wilde, J., remarks: ⁹—“The equity of redemption certainly passed by the second mortgage; and by the assignment also, unless the sheriff’s sale to the tenant prevented. The attachment did not change the estate of the debtor, or take away his power of alienation, and the cred-

¹ *Tucker v. Buffum*, 16 Pick. 46.

² *Ibid.* ³ *Ibid.* ⁴ *Ibid.*

⁵ *Rev. St. (Maine)*, 557.

⁶ *Porter v. King*, 1 Greenl. 297.

⁷ *Hodge v. Gallup*, 3 Denio, 527.

⁸ *Bigelow v. Willson*, 1 Pick. 485.

⁹ *Ib.* 492.

itor acquired no property thereby; he had only a lien, and the debtor might legally convey the property subject to the lien. This lien the purchaser might discharge by payment of the debt before execution executed, or he might afterwards redeem the estate, if it were by law redeemable." He proceeds to remark, that the attachment, being a mere lien, did not so far divest the mortgagor's title, as to leave him no interest to convey; that although the statute does not expressly provide for the redemption of an equity sold on execution, yet if construed literally, heirs and executors would be debarred, as well as assignees; and that a right of this nature, being a possibility coupled with an interest, was assignable, especially in equity.

58. The assignee of an equity of redemption has the same right as the execution debtor to redeem real estate sold on execution.¹

59. The right to redeem an equity of redemption, sold on execution, is validly assigned in equity by a common quitclaim deed, which remises, releases, and quitclaims the party's right and interest in and to the mortgaged premises, *habendum* to the grantee, his heirs and assigns.²

60. Where rights in equity, of redeeming distinct parcels of land from several mortgages, are sold upon one execution, they ought to be sold separately, and not for a gross sum; for the debtor has a right to redeem one without redeeming others. But a third person cannot object to a joint sale.³

61. Immediately after a sale, the purchaser brought an action against the mortgagor for the land. Afterwards, within a year, the defendant tendered to the plaintiff the purchase-money and interest, but not the costs of suit. Held, no bar to the action; but that on payment of the money and costs the Court would stay proceedings.⁴

62. Where an equity of redemption is sold on execution, if the mortgagor transfers his title, and the land is redeemed from the execution purchaser, the mortgagor cannot main-

¹ *Hepburn v. Kerr*, 9 Humph. 726.

² *Tucker v. Buffum*, 16 Pick. 46.

³ *Fletcher v. Stone*, 3 Pick. 250.

⁴ *Jewett v. Felker*, 2 Greenl. 339.

tain an action against the latter for the mesne profits received by him. The right of action is in the mortgagor's assignee.¹

63. The lien, created by the attachment of an equity of redemption, may extend beyond the amount of the judgment, and cover the whole sum for which the equity is sold on execution. Thus where the mortgagor, after such attachment, conveys his interest, and the equity is subsequently sold on execution for more than the amount of the execution, the surplus belonging, not to the purchaser from the mortgagor, but the mortgagor himself, such purchaser cannot redeem, without paying the whole sum paid to the sheriff.²

64. It is held in Massachusetts, that, where an equity of redemption is taken on execution, the whole estate of the debtor is taken from him. While a mortgagor is considered as *owner*, against all but the mortgagee, a debtor, after such levy, has not strictly any estate or interest in the land. He is not a freeholder. He has only a *possibility* or right to an estate, on payment of a certain sum of money. The law presumes that he has received the full value of his estate; and the right of redemption still reserved to him is a mere personal privilege to keep his own land, if he does not wish to part with it at its full value. He is under no obligation to redeem. There is no reciprocity between him and the creditor. The creditor cannot demand the money, but is merely bound to convey the land, on receiving payment in a certain time.³ Upon these grounds, the right in question was held not liable to be again taken upon execution. (*j*) The Court in their opinion remark, that the legislature might have made it thus liable, but have not done so, probably because it was considered of no value. *Real estate mortgaged* is made subject to execution; because land is usually

¹ *Mason v. Davis*, 11 N. H. 383.

² *Gilbert v. Merrill*, 8 Greenl. 295.

³ *Kelly v. Beers*, 12 Mass. 389, 390;

Barker v. Parker, 4 Pick. 505.

(*j*) Otherwise in Maine. Maine Rev. Sts. 390.

mortgaged for less than its value, and the right of redemption, therefore, is a valuable interest. Nor can it be said that the debtor, after such sale, still owns his former right of redemption, but subject to a new lien by the purchaser. This is not the language of the statutes. His whole estate is taken from him. His remaining right is like a right of preemption, as if the purchaser had covenanted to convey to him at a certain price, paid in a certain time.¹ (*k*)

65. An equity having been sold on execution, the same day another sheriff sold the same right upon another execution to another purchaser, and gave him a deed of it. Two days afterwards, the same right was sold and conveyed upon a third execution to still another purchaser, who brings an action to recover the land against the mortgagor. Held, no title had vested in the demandant, and the suit could not be maintained.²

66. But after an execution sale of an equity of redemption, the mortgagor has a remaining interest which he may mortgage anew, and his right to redeem the second mortgage may be assigned, attached, or taken on execution.³ Wilde, J., remarks: ⁴ — “ There is nothing in this position that we can perceive, at all inconsistent with the principles laid down in the case of *Kelly and ux. v. Beers*. In that case, the Court considered the legal rights of the parties, and it cannot be controverted, that by the first sale of the equity, the mortga-

¹ *Kelly v. Beers*, 12 Mass. 389, 390.

³ *Reed v. Bigelow*, 5 Pick. 281.

² *Ibid.*

⁴ *Ib.* 283, 284.

(*k*) Upon this ground, the acts, upon the land, of a mortgagor, whose equity has been sold on execution, may be treated as trespasses. *Smith v. Sweetser*, 32 Maine, 246. And, on the other hand, before redemption, whether he be in possession or not, he cannot maintain trespass *quare clausum* against a purchaser, for acts done upon the land. *Ib.* Where a creditor of a mortgagor sought to be substituted for certain mortgagees, and it appeared that the property covered by the mortgages had been sold under them for its full value, it was held, that there was nothing remaining of the mortgaged property, which could be subjected to the creditors of the mortgagor. *Bank of Kentucky v. Milton*, 12 B. Mon. 340.

gor's whole legal estate passed ; but he had a right to redeem the equity, and when he assigns this right by way of mortgage, he has a right to redeem it back again by performance of the condition. This new right created by the second mortgage, is, we think, attachable, and may be sold on execution. However such a right may be considered in a court of law, in equity it is considered as an interest in the land. The right of redeeming the first mortgage, and that of redeeming the second, were distinct rights, and the sale of one was not inconsistent with the sale of the other ; for although the whole legal estate passed by the first sale, an equitable interest remained, which might be mortgaged, and being mortgaged, was subject to the right of redemption ; and there seems no good reason why such a right, when it is deemed valuable, may not be taken in execution for the benefit of creditors."

66 *a*. The execution sale of an equity of redemption passes only the debtor's interest ; and if a first mortgagee become the purchaser, the second mortgage is not affected thereby.¹

66 *b*. In Connecticut it is held, that an equity of redemption is indivisible, and, though it may be attached and set off in satisfaction of a debt, cannot be apportioned among creditors.²

67. Where the same equity of redemption is simultaneously attached by two creditors, both executions may be levied upon it, and each creditor will be entitled to a moiety of the proceeds, without regard to the relative amount of the debts. They hold, not in shares or proportion, but *per mi et per tout*. But, as the attachment is a mere lien or security, if the moiety which either can hold is more than sufficient to satisfy his debt, the surplus will go to the other.³

68. Where an equity of redemption is successively attached by different creditors, a sale on execution by the second, before the first has recovered judgment, is void as against

¹ Crow v. Tinsley, 6 Dana, 402.

² Franklin v. Gorham, 2 Day, 142.

³ Sigourney v. Eaton, 14 Pick. 414 ; Durant v. Johnson, 19 Pick. 544 ; Perry v. Adams, 3 Met. 51.

all the others ; and the third acquires the rights of the second. Such was the law of Massachusetts prior to the provisions of the Revised Statutes, chap. 99, §§ 34, 35.¹ (l)

69. An officer seized an equity of redemption on two executions, sold it on one, which he satisfied with a part of the proceeds, and applied the balance to the other. Held, the levies were legal.²

70. Personal property and an equity of redemption having been attached in the same suit, the debtor assigned the latter, and it was subsequently attached in another action. The personal property was sold on mesne process, judgments were recovered, and executions in both suits delivered to the officer. Held, he was bound to apply the proceeds of the personal property to the execution in the first suit, in relief of the assignee.³

71. If an equity of redemption is taken on several executions by different officers, and the proceeds of sale are more than sufficient to satisfy the executions in the hands of the officer selling, he is bound to pay the surplus to the officer holding the other executions.⁴

72. If one officer commence the levy of one execution upon an equity of redemption, and on the same day another officer commence an extent on the land, no time of day being fixed by either, the Court will not construe the extent as prior to the levy.⁵

¹ Pease v. Bancroft, 5 Met. 90.

⁴ Denny v. Hamilton, 16 Mass. 402.

² Bacon v. Leonard, 4 Pick. 277.

⁵ Bagley v. Bailey, 4 Shepl. 151.

³ Forbush v. Willard, 16 Pick. 42.

(l) The statute provides, that when property is seised on execution, and the further service of the execution suspended by a prior attachment, the estate shall remain bound by such seizure, until set off or sold, in whole or in part, under the prior attachment, or until that attachment is dissolved. If the estate is set off or sold in part under the prior attachment, or if that is dissolved, the estate, or such part as remains unsold, shall continue bound for thirty days by the seizure ; and the service may be completed, though the return day is passed.

73. If after attachment of an equity of redemption a second mortgage is made and duly recorded, and then another attachment made, and executions in both suits delivered to an officer, and the equity sold upon the first; the officer is not bound to search the records for an intermediate conveyance, but may apply the balance to satisfy the second execution, if he is not notified of the second mortgage.¹

74. Notice of his mortgage by the second mortgagee, and that it is recorded, without producing the evidence of his title, will not bind the officer to pay him the balance, but will bind him to retain the money a reasonable time, in order that such evidence may be produced. Reasonable time is not allowed, if the money is paid over on the second execution upon the day of sale.²

75. A sheriff's deed of an equity, sold on execution, covenants only for the regularity of his proceedings. For breach of such covenant, the measure of damages is the consideration paid, with interest. But if the purchaser holds a second execution, in satisfaction of which the surplus proceeds are applied, the measure of damages is the value of the equity, not the sum bid and stated in the deed.³

76. It has been held, that a right in equity to redeem, being a mere *incorporeal hereditament*, will pass by an execution sale, though the land have been long in possession of a disseisor.⁴ In an earlier case, or a previous hearing of the same case, it was remarked, that an execution purchaser might maintain a real action for the land against a stranger, *unless the latter had disseised the mortgagor*, before the sale.⁵ The true principle upon this subject, and one which seems to reconcile the apparent contradiction between the former cases, has been settled in a case long subsequent to both of them.⁶ It is here held, that, if the mortgagor is seised at the time of the execution sale, the sheriff's deed passes the mortgagor's actual seisin, as a deed from the mortgagor

¹ Littlefield v. Kimball, 5 Shepl. 313.

² *Ibid.*

³ Wade v. Merwin, 11 Pick. 280.

⁴ Wellington v. Gale, 13 Mass. 483.

⁵ *Ib.* 7 Mass. 139.

⁶ Poignard v. Smith, 6 Pick. 172.

would have done ; if he is not seised, then it passes *a right of entry*, or a *seisin in law*. The purchaser may enter, and then bring a writ of entry upon his own seisin ; or perhaps, before entry, he might bring an action, founded upon the seisin of the mortgagor, to whose rights he has succeeded. (m) *A fortiori*, he may maintain an action for the land against the mortgagee, after payment or tender of the mortgage debt.¹

76 a. But a void levy gives the purchaser no rights as against the mortgagee.

76 b. Thus, in *Partridge v. Gordon*,² the demandant in a writ of entry claimed title under a deed from one Webb, which it was agreed was a mortgage, the condition of which had been broken. The tenant claimed under judgment creditors, who had extended executions upon the premises, which levies were held to be void. Upon a motion by the tenant for a conditional judgment, the Court remarked : — “ Where a mortgagee brings his action for possession and not for foreclosure, he need not set forth his deed, but may declare upon his seisin generally. In such case, he is entitled to the absolute judgment against all but the mortgagor, or persons lawfully claiming under him ; and against them also, unless by plea they set forth their interest, and pray that the conditional judgment be entered, and then, if the condition be broken, the Court will enter the conditional judgment. But the tenant has shown no legal privity with the mortgagee, or in the estate, and has not acquired any right to redeem ; the levy having been declared to be void.”

¹ *Porter v. Millet*, 9 Mass. 103.

² 15 Mass. 486.

(m) See Mass. Rev. Stat. 463, (also Gen. Stats.) which provide for the levying of executions upon all rights of entry, and rights of redeeming lands mortgaged. Stat. 1798, c. 76, provided, that the sheriff's deed of a right in equity should pass the title, in the same manner as a deed executed by the debtor himself. Hence it was held, that such purchaser becomes seised except as against the mortgagee, and may maintain an action for the land, without actual entry. *Wellington v. Gale*, 7 Mass. 138.

76 *c.* Where a bond, payable in two instalments, was secured by two mortgages, the first of which was to secure both instalments, but the second only the first instalment, and the second instalment was paid, and the first mortgage discharged; it was held, that purchasers, at a sheriff's sale, of the land covered by the second mortgage, with notice of the facts above stated, could not be relieved against the prior incumbrance, the first mortgage having been released in good faith, and without notice of the subsequent incumbrance.¹

76 *d.* If a mortgagee purchase the equity of redemption at an execution sale, and then assign the mortgage, covenanting that it is still due; the assignment is valid, though he remain in possession.²

76 *e.* Where the right and title of several defendants to certain premises is sold on execution, and a mortgage creditor of one of them redeems, the deed of the sheriff to him conveys only the interest of the debtor of the mortgagee in the premises.³

77. The execution sale of an equity of redemption will not operate as an ouster of the mortgagee, who has previously entered under his mortgage. Such sale is effectual in passing all the mortgagor's rights; and an entry for the purpose of seizing and levying upon the equity is no trespass, being consistent with the mortgagee's title. But for any subsequent entry, the mortgagee may maintain trespass against the purchaser, without a reëntry.⁴

78. The right of redeeming subsequent mortgages may be taken in execution. Thus, the creditor of a mortgagor having attached an equity of redemption, the debtor made another mortgage, after which all his interest in the land was attached by another creditor. The equity first attached was then sold on execution, which was satisfied by a part of the proceeds; and, before the officer had paid over the

¹ *Cheesebrough v. Millard*, 1 John. Ch. 409.

² *James v. Morey*, 2 Cow. 246.

³ *Neilson v. Neilson*, 5 Barb. 565.

⁴ *Shepard v. Pratt*, 15 Pick. 32.

surplus, the execution of the second creditor was delivered to him. Held, the surplus belonged to the second mortgagee; and the second creditor might levy on the right of redeeming the second mortgage.¹

79. Where an equity of redemption was sold on execution, and before the sale a note for the subsequent rent of the premises had been given and assigned to the mortgagee; held, the purchaser was not entitled to such rent.²

80. Where lands levied on are delivered to the defendant at an annual valuation fixed by the inquest; a mortgagee, holding a prior lien, which is not affected by the levy, cannot claim the fund.³

81. In Louisiana, where a sale on execution is conformable to law, and nothing remains, after satisfying the execution, to discharge subsequent mortgages on the property; the sheriff is bound to release, and the recorder of mortgages to erase them, without any order of Court as against the holders of such mortgages. Otherwise, where the forms prescribed for forced alienations have not been complied with.⁴

82. Where the highest and last bid, made at a judicial sale, is insufficient to discharge a mortgage having preference over the judgment; there can be no adjudication.⁵ (*n*)

¹ *Clark v. Austin*, 2 Pick. 528.

² *Abel v. Wilder*, 7 B. Mon. 530.

³ *Bank v. Patterson*, 9 Barr, 311.

⁴ *Passebon v. Prieur*, 1 La. Ann. R. 10; *Theard v. Prieur*, Ib. 16.

⁵ *Fernandez v. Bein*, Ib. 32.

(*n*) It has been already seen (ch. 14,) that, as a general rule, the law does not permit the mortgagee to levy his execution upon the equity of redemption, in a suit on the mortgage debt. The following points have been decided in cases where this proceeding seems to have been sanctioned by the Courts.

In *Jackson v. Hull*, (10 Johns. 481,) it was held, that, if the holder of a bond secured by mortgage recover judgment on the bond, and cause the mortgaged premises to be sold on the execution to one having notice of the existence of the mortgage; it will be deemed merely a sale of the equity of redemption, not affecting the lien of the mortgagee.

The assignee of a note and mortgage recovered judgment upon the for-

mer, and the mortgaged premises were sold upon the execution, the creditor himself being the purchaser. Held, the judgment was thereby discharged to the amount of the value of the land. *Johnston v. Watson*, 7 Blackf. 174.

A mortgagee purchased the mortgaged premises, at a sale upon an execution, issued in a suit on the mortgage. He paid no money to the officer, but gave his receipt for the amount. The sheriff executed a deed to the mortgagee, but did not acknowledge it. The mortgagee remained in possession several years, when the premises were sold under a judgment subsequent to the mortgage. Held, the last purchaser took no title. *Stoever v. Rice*, 3 Whart. 21.

In Ohio, where a mortgagee recovers judgment for the mortgage debt, and causes the mortgaged premises to be sold upon the execution; the purchaser takes an indefeasible title, though the price paid is not sufficient to pay the whole debt. *Fosdick v. Risk*, 15 Ohio, 84.

In New Jersey, where a mortgagee recovers judgment on the mortgage debt, and causes the mortgaged premises to be levied on and sold, the mortgage debt is extinguished to the amount of the purchase-money. *Deare v. Carr*, 2 Green, Ch. 513.

So, though the judgment is recovered in the name of husband and wife, and the husband causes the sale to be made, and becomes the purchaser. *Ibid.*

So, though at the time of the sale the mortgagee was ignorant of the existence of his own mortgage, and there are intervening incumbrances. *Ibid.*

The following recent case in Massachusetts sustains the validity of a levy on execution, notwithstanding a variety of miscellaneous objections.

An equity of redemption was attached and levied on, sold on execution, and conveyed, as "all the right in equity" which the mortgagor had at the time of attachment, "to redeem certain mortgaged real estate in B., described in certain mortgage deeds," stating the names of mortgagors and mortgagees, the dates of the mortgages, and the books and pages where they were recorded. Held, the levy and sale were valid as against one claiming by purchase from the mortgagor, though one of the parcels did not belong to the mortgagor at the time of the attachment or the levy, this being an injury to the purchaser, if to any one; though a parcel, not belonging to him, and not included in the return, was bought with the rest, and its price included in the general sum bid; though the mortgage, subject to which the equity was sold, described the premises as two lots embraced in a certain former mortgage, without further designation, except as to one of the lots, the former mortgage embracing three lots, and it being impossible to distinguish which of the other two was intended; though other judgment creditors had agreed with the purchaser, that he might bid off the equity, for the amount of all their claims; though one debt had been paid before

the recovery of a judgment upon it, with the knowledge of the purchaser ; though the date of the mortgage was wrongly stated in the advertisement ; and though certain tools and machiney, not included in the mortgage, were embraced in the sale, and increased the price. *Bullum v. Deane*, 8 Cush. 36.

CHAPTER XXXVIII.

MORTGAGES OF PERSONAL PROPERTY. NATURE, REQUISITES, ETC.,
OF SUCH A MORTGAGE.

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| 1. Mortgages of real and personal property, compared and distinguished. | 13. Parties to a mortgage. |
| 3. Rights of the mortgagee as to possession. | 15. Absolute bill of sale, and defeasance. |
| 4. Not perfected without the assent of both parties. | 18. Parol evidence; whether admissible to prove an absolute bill of sale to be a mortgage. |
| 5. Form of a mortgage; no particular language is necessary; valid without a seal; partnership property. | 21. Power of sale. |

1. HAVING now completed the consideration of *Mortgages of Real Property*, we proceed to a view of *Mortgages of Personal Property*. Many of the rules and principles, which have been stated at length in regard to the former, are equally applicable to the latter; but, on the other hand, the very different nature, qualities, and incidents of real and personal estate, running through all the titles of the law which respectively appertain to them, are found also materially to affect this particular subject of mortgages. (a) In

(a) "The title to real property can only be transferred by deed. When conveyed in mortgage, if the condition is not performed, the mortgagee has the title until he has released or conveyed it. It is the object of our registration laws to protect a purchaser who takes a conveyance in good faith according to the apparent title on the record. But no deed or writing is made by law essential to the transfer of title to personal property. A purchaser must take it upon his vendor's warranty of title. A mortgage duly recorded gives certain rights to the mortgagee, created and defined by the statute; but the statute does not change the nature of the property, nor require that all subsequent changes in title shall be shown upon the record. An assignment or release of the mortgage is not required to be recorded. The mortgagor and mortgagee may join in a sale, which will give a perfect title to the chattel sold, and the record furnish no evidence of it. A creditor of the

general it may be remarked, that the law of mortgages of personal property partakes less of technicality than that relating to the other class ; following in this respect the general distinction between real and personal estate, the former being governed by rules of very ancient origin, and the latter having risen into any considerable importance, as a subject of common-law regulation, only at a comparatively recent period. On the other hand, the interposition of *equity*, to mitigate the severity of the common law in relation to *conditions*, to prevent *forfeiture*, and guard necessitous borrowers from the rapacity of exacting lenders, has been far more directed to real than personal property. Indeed, as will be more fully seen hereafter, an *equity of redemption* of personal property, as a distinct and well defined title, subject to the various incidents of ownership and disposal, which appertain to other acknowledged interests and estates, can hardly be said to exist. Another distinguishing feature of that branch of the law of mortgages, which we are about to consider, grows out of the *movable* and *destructible* nature of personal chattels ; (b) necessarily calling for a peculiar set of rules to protect the rights of the respective parties, and of those who claim under one or both of them. Hence arise the numerous questions and cases as to the effect of *continued possession* on the part of the mortgagor ; and the statutory provisions relating to *registration*, and the mode of *attaching* or *levying upon* mortgaged personal property, with the various judicial constructions of those statutes. Still another peculiarity of the mortgage of personal property, is its analogy in some respects to a *pawn* or *pledge*, while in others it partakes more

mortgagor may attach the mortgaged property, and acquire a right to apply it to the satisfaction of his debt, unless the mortgagee interposes seasonably for the assertion of his rights. The mortgagee may be summoned as the trustee of the mortgagor, and the validity and extent of the mortgage may be tried in that form." Per Hoar, J., *Bigelow v. Smith*, 2 Allen, 265.

(b) Statutory provisions on the subject are held to apply only to mortgages executed within the State, or relating to property at the time within its jurisdiction. *Fairbanks v. Bloomfield*, 5 Duer, 434.

of the character of mortgages of real estate. On the whole, it may safely be said, that mortgages of personal property are so far governed by distinct rules and principles, as to require that they be separately treated in any systematic view of the general subject of mortgages.

2. The same debt may be secured by mortgages of both real and personal property. Thus a mortgage of lands having been made to secure a loan, and bank shares assigned as further security, the shares were afterwards transferred by the mortgagor. Held, they were still liable for the debt, if the real estate proved insufficient to pay it.¹ (*c*)

3. A mortgagee of chattels has the legal title or general property, even before the debt is due, liable to be defeated by redemption : (*d*) and a right to immediate possession, unless otherwise agreed.² (*e*) Ordinarily, however, the possession remains with the mortgagor ; and in this a mortgage differs from a pledge.³ And it is said a mortgagee of personal property will be restrained by the Court from taking possession, before breach of condition.⁴ More especially, when a

¹ McLean v. Lafayette, &c. 4 McL. 430.

³ Conner v. Carpenter, 2 Wms. (28 Verm.) 237.

² Stewart v. Hanson, 35 Maine, 506 ; Ferguson v. Clifford, 37 N. H. 86.

⁴ Bank v. Guardin, Spears, Ch. 439.

(*c*) As to joining real and personal property in one mortgage or pledge, see *Mobile, &c. v. Talman*, 15 Ala. 472 ; *Despatch, &c. v. Bellamy*, 12 N. H. 206.

(*d*) His title is good against an assignee for the benefit of creditors. *Wilson v. Gray*, 2 Stockt. 323.

(*e*) A note in payment for a cow, containing a stipulation that the property should remain in the promisee till the note was fully paid, was given as security for the payment of another note by the same maker, and containing a similar stipulation, for a yoke of oxen. The promisee having taken possession of the oxen before the time of payment for them had elapsed ; held, he still had the right of possession of the cow till the maturity of the notes, although the oxen were of the full value of the note given for them. *Woodman v. Chesley*, 39 Maine, 45.

It is sometimes held that the mortgagee has the right of possession, unless other liens have attached to the property, whilst in possession of the mortgagor. *Whisler v. Roberts*, 19 Ill. 274.

mortgagor of chattels, by the terms of the mortgage, is to retain possession until a default in payment, the mortgagor's legal right of possession during the time limited cannot be disturbed by the mortgagee.¹ If the mortgagor unconditionally sells the property, the mortgagee may take possession, notwithstanding a stipulation for the possession of the former till the debt should become due.² (*f*) After the debt becomes due, the mortgagee may lawfully enter the premises of the mortgagor, and carry away the property.³ But a mortgagor in possession may have an action of trespass against an officer for wrongfully taking the property.⁴

4. A mortgage of chattels, like other contracts and conveyances, requires the assent of both parties to give it complete legal effect. The proper evidence of such assent is delivery of the mortgage. Delivery to the register, and subsequent possession by the mortgagee, are evidence of such delivery, and the date is *primâ facie* evidence of delivery at that time.⁵ Where several mortgages are recorded, the one first ratified has priority.⁶ But where a debtor, without the knowledge of his

¹ Fairbanks v. Bloomfield, 5 Duer, 434.

² Whitney v. Lowell, 33 Maine, 318.

³ Nichols v. Webster, 1 Chand. 203.

⁴ Vaughan v. Thompson, 17 Ill. 78.

⁵ Foster v. Perkins. 42 Maine, 168.

⁶ 45 Maine, 602.

(*f*) Mortgage to the plaintiff of an engine lathe, with an agreement for the mortgagor's possession till breach of condition. The plaintiff delivered the lathe to a carrier, to be taken to the town where the mortgagor lived, and on the same day the mortgagor pledged it to the defendant, promising to have it sent to him upon its arrival. The next morning the defendant went to the carrier, and ordered a teamster to carry it home, which he did on the same day. After the order, but before delivery, the plaintiff recorded his mortgage. The defendant afterwards sold and delivered the lathe, and to a demand of the plaintiff, replied that he had sold it, and did not know where it was, and refused to aid in finding it. Held, the plaintiff might maintain an action for conversion. Chamberlain v. Clemence, 8 Gray, 389. The mortgagee may bring replevin against a vendee of the mortgagor without a demand. Partridge v. Swazey, 46 Maine, 414. And, in general, notwithstanding an agreement for the mortgagor's possession, the mortgagee may bring an action for the property. Googins v. Gilmore, 47 Maine, 9. The question of the right of possession is for the jury. Ibid.

creditor, executed and put on record a mortgage of personal property, to secure the debt, and appointed a third person to act for the mortgagee; and, soon afterwards, the debtor's property was assigned under the insolvent law, and after the assignment the mortgage was delivered to the mortgagee: held, the property vested in the assignees.¹ The Court say:² "No ratification, after this assignment, can avail to intercept the title of the assignees. It has been argued, that the recording of the mortgage deed was equivalent to the actual delivery of the property; and so it would have been, if the deed had been delivered to the plaintiff, or recorded by her direction. But before the record can have this effect under the statute, the mortgage must be completed; there must be an existing contract; which, in the present case, the plaintiff has failed to prove."

5. With regard to *the form* of a mortgage, the law has established no particular terms or language, in which it is to be expressed, if the intention is apparent. Whether an instrument, by virtue of which the plaintiff avers that he became entitled to the possession of personal property alleged to have been converted by the defendant, is or is not a mortgage, is a question of law; and to enable the Court to determine it, the complaint should set forth, if not the whole instrument, at least those provisions which are relied on as giving to it the character of a mortgage.³

6. It has been said, though perhaps somewhat too generally, that, to make a conveyance a mortgage upon its face, it must show that the consideration was either a debt due or money lent at the time, or contain an express covenant for payment.⁴

7. An instrument by which one agrees to sell, and another to purchase, certain personal property at a specified price, and that the vendor shall have a lien upon the prop-

¹ *Dole v. Bodman*, 3 Met. 139; acc. *Oxnard v. Blake*, 45 Maine, 602.

² *Dole v. Bodman*, 3 Met. 143.

³ *Farbanks v. Bloomfield*, 2 Duer, 349.

⁴ *Hickman v. Cantrell*, 9 Yerg. 172; *Scott v. Henry*, 8 Eng. 112. See *Folsom v. Fowler*, 15 Ark. 280; *Thompson v. Blanchard*, 4 N. Y. 303.

erty till the purchase price is paid, is in the nature of a chattel mortgage.¹ So a conveyance to secure a surety was held a mortgage, and valid against creditors, though the mortgagor continued in possession and use of the property.² So the following instrument, "Borrowed from, &c., \$275, for which I have placed in his hands, as security, a negro girl; should I not pay said sum of money by the 20th inst., the said girl is to be the absolute property of said, &c., and I bind myself to give a bill of sale when demanded," was held a mortgage, and, the slave having died, the mortgagee was allowed to maintain an action against the mortgagor for the sum mentioned therein."³ So A. executed to B. a bill of sale of a negro, and B. executed an instrument as follows: "Received of A. a negro. I promise to account to him for the amount thereof in three years from this date, or return the fellow, without being accountable for hire; and if he should die in this time, A. is to be the loser." Held, a mortgage, and that B. was bound to account for the hire of the negro.⁴ So an absolute conveyance of a horse, with condition to be void upon payment of a certain sum, is a mortgage, and void as against creditors, if not registered.⁵ So the recital, in an instrument, that certain slaves should be bound for the payment of a note, which mortgage is duly recorded, creates a valid lien on the slaves, as against a subsequent mortgage.⁶ So a deed, which has a proviso for "the privilege of redeeming the property conveyed," imports, *prima facie*, that it is intended as a security, and not a sale.⁷ So the following writing: — "This day received of R. two hundred and twenty-five dollars, for the payment of which, by the 25th December next, I hereby assign over to said R. the free and full title to a certain negro girl named Hulda," is a mortgage, and not a bill of sale.⁸ So a bill of sale, made expressly to secure a debt, and stating that, on payment of the debt by the property or otherwise, the remaining articles

¹ Dunning v. Stearns, 9 Barb. 630.

² Ward v. Sumner, 5 Pick. 59.

³ Hart v. Burton, 7 J. J. Marsh, 322.

⁴ Berry v. Glover, 1 Harp. Ch. 153.

⁵ McFadden v. Turner, 3 Jones, 481.

⁶ Bank, &c. v. Vance, 4 Litt. 168.

⁷ Wilson v. Weston, 4 Jones, Eq. 349.

⁸ Ross v. Ross, 21 Ala. 322.

shall be released to the seller, is a mortgage.¹ Or a writing, purporting at the commencement to be a bill of sale of a negro, signed by the vendor only, but afterwards specifying, that if the price were not paid when due, the vendor might retake the negro, sell him, and apply the proceeds to the payment of the note given for the price.² So a bill of sale to a surety, made for the purpose of indemnity, and providing that, if he shall be compelled to pay the debt, he may turn out the property on execution, or sell it and account for the proceeds, is in the nature of a mortgage.³

S. But where there was annexed to an absolute bill of sale a condition, that, if the vendee "should not be satisfied" with the property, which was not present, the vendor should have a right to "redeem," upon paying the amount of the purchase-money, "or a negro girl, to the satisfaction" of the vendee; held, the instrument was not, upon its face, a mortgage.⁴ So a provision in a bill of sale, that the seller shall retain a lien upon the property for the price, is not a mortgage.⁵ So a deed of chattels, dated October 3, in consideration of the vendor's being justly indebted to the vendee in a certain sum, secured to him by the vendor's promissory note, dated October 1, payable in two years with interest, and of one dollar, &c.; and reciting a delivery of part in the name of the whole: was held not to be a mortgage.⁶ Shaw, C. J., says: ⁷—"The deed was not a mortgage. It possesses all the characteristics of an absolute conveyance; and there is no defeasance or condition, which is essential to the character of a mortgage. The only color for considering it a mortgage or pledge is, that it recites an indebtedness by note, by the grantor to the grantee, and does not in terms declare the conveyance and (a) satisfaction of that debt. Hence it is inferred, that it must have been intended as a security and not in satisfaction. But this implication is too remote. Since the law has more defi-

¹ Bissell v. Hopkins, 3 Cow. 166.

² Foster v. Calhoun, Dudl. (S. C.) 305.

³ 75

⁴ Marsh v. Lawrence, 4 Cow. 461.

⁴ Chambers v. Hise, 2 Dey. & B. Ch.

⁵ Barnett v. Mason, 2 Eng. 253.

⁶ Miller v. Baker, 20 Pick. 285.

⁷ Ib. 286, 287.

nately recognized mortgages of personal property, given under certain restrictions, provided for an equity of redemption, and made such right of redemption liable by attachment for the debts of the general owner, it becomes important, that the condition should not only be expressed, but that the terms should be stated so definitely as to enable creditors, not parties, to ascertain the true character and meaning of the contract, with a good degree of certainty." So by a written contract between A. and B., B. agreed to pay to A. \$1,300 by instalments, and A. agreed that B. should have the use of a certain canal boat, &c., unless he should fail to pay said sum, or some part of it, or should remove the boat out of the State, or transfer the same without the consent of A., &c. On the full payment of said \$1,300, A. was to execute and deliver to B. a bill of sale of the boat, and put him in possession. If default was made of payments, A. was to have a right to sell the boat at auction, and apply the proceeds to paying the balance unpaid, paying the surplus to B. The contract was not to be so construed, as to give B. any title to the boat, except to possess and use it. Held, this was not a mortgage, but an executory contract for sale on condition; and that B. could not acquire any title to the boat, until he had paid for it, nor transfer any title to it as against A. or his assignees.¹ So a mere security for a loan, with power of sale, is held not to be a mortgage.² Nor an instrument intended as a security for money loaned, authorizing the lender upon default in re-payment to enter the premises of the borrower, and carry away certain slaves and sell them, and pay himself out of the proceeds, and return the overplus. This is only a *power*.³ So where there was a bill of sale of a negro, at a certain price in hand paid, the vendee agreeing, at the time, in consideration of the sale, to sell the slave to the vendor, at the same price, "if applied for on the first day of January

¹ Brewster v. Baker, 20 Barb. 364;
(S. C.) 16 Barb. 613.

² Attleborough v. Commissioners,
&c. 33 Eng. Law & Eq. 413.

³ McGriff v. Porter, 5 Flor. 373.

next;" held, the writings did not constitute a mortgage, nor was the latter a mere agreement by the purchaser to stipulate for a resale at the time appointed; but itself provided for a resale, leaving nothing open for future adjustment.¹ So a note was given for a certain sum, "it being part payment for a mare, said mare to be holden to A." (one of the signers) "for the amount that he may pay for the same." Held, not to be a mortgage.²

9. Where a debtor, in contemplation of insolvency, executes a chattel mortgage to one creditor, for the purpose of securing such creditor in preference to others, with an understanding that the mortgagee shall satisfy his claim out of the goods, and then surrender the residue to the mortgagor; the mortgage is an assignment of property in trust, and the mortgagee a trustee, for the benefit of all the creditors, in proportion to their respective debts.³

10. The principle, that the precise form of a mortgage is immaterial, has been applied, even where the form was prescribed by statute. Thus an act empowered trustees to purchase land, &c., for the purpose of making public docks, and to raise funds by borrowing money on the security of the rates and tolls to be levied under the act, and of any property vested in them by virtue of the act; and provided that the mortgages given should be in a certain form, and registered. During the execution of the works, a large quantity of tools, machinery, and materials, were purchased by the trustees for the purposes of the works, and subsequently mortgaged by them to the contractor; but the instrument was not in the form prescribed, nor registered. Held, the mortgage was still valid, in preference to an execution against the company.⁴

11. No *seal* is necessary to a mortgage of personal property, even though it is in form of a deed, and contains the words "my seal."⁵ On the other hand, as the law does not

¹ Sewall v. Henry, 9 Ala. 24.

² Gushce v. Robinson, 40 Maine, 412.

³ Brown v. Webb, 20 Ohio, 389.

⁴ McCormick v. Parry, 11 Eng. Law & Eq. 551.

⁵ Despatch, &c. v. Bellamy, &c. 12 N. H. 205; Flory v. Denny, 21 Law T. Rep. (N. S.) Exch. 223; 11 Eng. Law & Eq. R.; Tapley v. Butterfield, 1 Met. 517; Gerrey v. White, 47 Maine, 504; Sweetzer v. Mead, 5 Mich. 107.

require a mortgage of chattels to be under seal, and as one partner has power to mortgage partnership property to secure a partnership debt, such mortgage is valid, though under seal.¹ (See s. 14.) So, a firm being indebted, one of the partners, in the absence of the other, and without his knowledge, executed to the creditor a mortgage of the whole stock in trade. The separate names of both partners were several times recited in the mortgage, as conveying the goods to the plaintiff, and the instrument concluded thus: "in witness whereof I the said Alvah and William A. Blaisdell have hereunto set our hands and seals," &c. Only one seal was affixed. The other partner testified, that if he had been present he should not have executed the mortgage. Held, the mortgage was valid.² Shaw, C. J., says,³ (in substance,) after disclaiming any decision that one partner can *generally* bind another by deed, more especially in the conveyance of real estate, or covenants of title; "if an act be done, which one partner may do without deed, it is not the less effectual, that it is done by deed. It is clearly within the scope of partnership authority, for one partner to sell such goods as have been purchased for sale. Supposing, then, a customer should choose to have a formal bill of sale under seal, in the name of the firm, and such bill should be executed by one of the partners; though the firm might not be liable to an action on the special covenants, yet the property would pass. And although the bill of sale should purport to be the act of both, it would not be the less the act of him who made it; and as his act would be sufficient to pass the property, it would not be less available because the name of his partner was added in such a form as to be inoperative." Upon the authority of one partner to mortgage the stock in trade, the learned Judge proceeds to remark:—"It is within the general scope of partnership authority for one partner to sell and dispose of all the partnership goods, in the orderly and regular course of business. It is also within the scope of partnership au-

¹ *Milton v. Mosher*, 7 Met. 244.

² *Tapley v. Butterfield*, 1 Met. 515.

³ *Ib.* 517, 518.

thority to pay the debts of the firm, and to apply the assets of the firm for that purpose. He being authorized to sell the goods to raise money to pay their debts; he may apply the goods directly to the payment of the debts; and, according to the exigencies of the occasion, he may pledge the partnership goods to raise money to pay the debts of the firm. If it were in the form of a consignment to a commission merchant or an auctioneer, and an advance of money obtained for the use of the firm, we think there could be no question but that it would be within the scope of partnership authority. And now that the law has given encouragement to mortgages of personal property, which is only another mode of pledging goods, and has substituted an instrument in writing capable of being recorded, and has given to such record an effect equivalent to actual delivery, we cannot perceive why it may not be resorted to by partners, as well as individual persons. To what extent one partner can bind another in the disposition of the entire property of the concern, is a question of power, arising out of the relation of partnership, and does not, we think, depend upon the form or manner in which it is exercised. Lands held by partners are considered as lands held by tenants in common; and as one tenant in common cannot pass any estate of his co-tenant, and as land cannot pass without deed, it follows that one partner cannot convey away the real estate of the firm, without special authority."

12. An instrument under seal, executed by one acting as *agent*, and purporting to convey real and personal estate, if it cannot lawfully operate as a conveyance of the real estate, for want of authority in the agent to execute the deed, may operate as an unsealed conveyance of the personal property, if the principal has authorized such conveyance, or has afterward legally ratified it.¹

13. With respect to the *parties* to a mortgage, it is held, that a mortgage or pledge of the personal property of a corporation, by one undertaking to act as agent, may be shown

¹ Despatch, &c. v. Bellamy, &c. 12 N. H. 206.

to be valid, either by evidence of the acts of the corporation prior to the mortgage, from which an authority to make it may be inferred, or by subsequent acts, showing a ratification. And if one assuming to have authority mortgage the property of the corporation to secure a loan, which comes to the use of the corporation and is retained by it; this will be evidence of such ratification.¹

14. A partner may execute a mortgage for the firm.² (See s. 11.) If a partner mortgage his interest in the partnership property, the other partner cannot apply it to the firm debts.³

15. In the case of personal property, as of real estate, an absolute bill of sale, conveyance or transfer, accompanied by an instrument of *defeasance* from the vendee to the vendor, constitutes a mortgage.⁴ Thus a debtor, about to stop payment, delivered to a creditor and surety his whole stock, with a bill of parcels, receipted in usual form; and at the same time an indenture was executed between the parties, stating the conveyance to be designed as security for the debt due the grantee, and certain others for which he was liable as indorser or surety, with power of sale, and a covenant to pay over the surplus to the debtor or his order. Held, the whole transaction constituted a mortgage, and that being proved to be *bonâ fide*, it was valid against creditors who were not provided for.⁵

16. But it is said, an absolute deed of a chattel, with a defeasance back, shall not operate as a mortgage, to the prejudice of third persons.⁶ And where A. made a bill of sale of a slave to B., and on the same day B. executed a defeasance, binding himself to restore the slave, on being repaid, in two years, if the slave should be alive; and no note was given, or obligation to refund the money advanced by B., and the risk of the life of the slave rested upon B., who retained possession of the slave sixteen years: held, there

¹ Despatch, &c. v. Bellamy, &c. 12 N. H. 206.

² Sweetzer v. Mead, 5 Mich. 107; Randall v. Baker, 20 N. H. 335.

³ Mosely v. Garrett, 1 J. J. Marsh, 212.

⁴ Winslow v. Tarbox, 6 Shepl. 132; Brown v. Bement, 8 Johns. 96; Hopkins v. Thompson, 2 Port. 433; Mosely v. Crocket, 9 Rich. Eq. 339.

⁵ Bartels v. Harris, 4 Greenl. 146.

⁶ Gaither v. Mumford, 2 Taylor, 167.

was no ground to believe that B. held the slave in trust for A., and that the transaction was a sale, and not a mortgage.¹

17. Bill of sale of certain slaves, accompanied by a defeasance, which made them subject to redemption upon certain conditions. The vendor having failed to redeem, the bill of sale, by his acknowledgment, was considered absolute, and possession given to the vendee. The vendor afterwards took the slaves secretly, and they were levied on as his property and bought by the defendant. The mortgagee brings detinue against him. Held, whether the transaction was a mortgage or an absolute sale, was a question for the Jury.²

18. From some of the cases heretofore cited,³ it would seem, that with regard to the *condition*, which constitutes the most material element of a mortgage, not only does it not require to be expressed in any particular language in the conveyance itself or an accompanying defeasance; but it may be proved by *parol evidence* of declarations and acts of the parties, and the facts and circumstances of the case. This rule, however, is not universally recognized. Thus, the maker of a promissory note delivered certain merchandise, with a receipted bill of parcels in the usual form, to the holder, who was to retain the property till payment of the note. Held, the bill of sale was not a mortgage, being in terms absolute; and that a condition or defeasance could not be grafted upon it by parol evidence.⁴ So where a deed of chattels recited an indebtedness by note, and did not declare the conveyance a satisfaction of such note, but contained no condition or defeasance; it was held not to constitute a mortgage.⁵ So it is held, that only in case of mistake, fraud, or undue advantage taken by the purchaser can parol evidence be received.⁶ So where a deed was

¹ Stone v. Willis, 4 B. Mon. 496.

² Hopkins v. Thompson, 2 Port. 433.

See also Hickman v. Cantrell, 9 Yerg. 172; Carter v. Burris, 10 Sm. & Mar. 527; Ing v. Brown, 3 Md. Ch. Dec. 521; Scott v. Henry, 8 Eng. 112; Dabney v. Green, 4 Hen. & M. 101;

Young v. Epperson, 14 Tex. 618; Fowler v. Stoneman, 11 Tex. 478; Fuller v. Parrish, 3 Mich. 211; Tyler v. Strang, 21 Barb. 198.

⁴ Whitaker v. Sumner, 20 Pick. 399. See Montany v. Rock, 10 Miss. 506.

⁵ Miller v. Baker, 20 Pick. 285.

⁶ Lewis v. Owen, 1 Ired. Ch. 290.

known by the parties, at the time of its execution, to be absolute, parol evidence, of an agreement that the vendor might redeem, is, it seems, inadmissible. So it has been held, that, though an absolute bill of sale has been shown to be a mortgage by parol evidence; such evidence must be clear and convincing to overcome a denial by the answer of the defendant.¹ So an absolute bill of sale was made of a ship, and the vendee took out a certificate of enrolment in his own name, but gave the vendor an acknowledgment in writing that the conveyance was made to him as collateral security for a debt due him, with a promise to reconvey on payment of the debt. The vendee had received none of the earnings, nor acted in any manner as owner. Held, although this transaction might as between the parties make the conveyance a mere security; as to all third persons, it was an absolute sale, and therefore the vendee was responsible for repairs made upon the vessel while his title continued.² So it is held, that the absolute transfer of a chose in action is not good as a mortgage, without delivering the property covered by it, or registration, even as against a party with notice.³

19. But it has been held, that parol evidence is admissible to prove a mortgage, even at law.⁴ Thus, in case of doubt whether a transfer was conditional or absolute, the excess in value of the property over the consideration may be offered in evidence.⁵ So, where a mortgage is given to secure a usurious loan, and a bill of sale is afterwards substituted by an agent whose authority is doubtful, parol testimony is admissible to contradict it, and the mortgagor will be allowed to redeem.⁶ (g) So it has been held, that an absolute deed is

¹ *Chapman v. Hughes*, 14 Ala. 218.

² *Tucker v. Buffington*, 15 Mass. 477.

³ *Tyler v. Strang*, 21 Barb. 198.

⁴ *Despard v. Walbridge*, 15 N. Y. (1 Smith,) 374.

⁵ *Todd v. Hardie*, 5 Ala. 698; *Mc-*

Laurin v. Wright, 2 Ired. Ch. 94; *Hudson v. Ishell*, 5 St. & P. 67.

⁶ *Cook v. Colyer*, 2 B. Mon. 71.

(g) Where a mortgage has no seal, parol proof is admissible of a wrong date. *Partridge v. Swasey*, 46 Maine, 414. Also to explain a variance between the note and mortgage. *Ib.*

turned into a mortgage by the intention of the parties at the time : and this intention may be proved by parol evidence.¹ So, where an absolute bill of sale is in fact a mortgage, but declared to be made absolute for the purpose of delaying creditors ; the mortgagor may still claim an account and a right to redeem against the mortgagee, though not against a purchaser.² So, in case of an absolute bill of sale to one holding a note of the vendor, the vendee admitted that the sale was not absolute, but the vendor was to have the property when he paid him his debt ; and did not take possession for two years. The vendor also paid part of the debt after the bill of sale, which was credited on the note in the vendee's handwriting. Held, this was sufficient proof of a mortgage, and the vendor was entitled to redeem.³ So L. and J., partners, advanced, as partners, money to W., and took an absolute bill of sale of two slaves. Other papers passed between them, tending to show that they were held as security only for the amount advanced. Upon dissolution of the partnership, L. took one of the slaves and J. the other. W. died, and his administrator brought a bill to redeem the slaves. L. and J. jointly answered, claiming the slaves on the ground of an absolute sale, honestly believing the right of redemption lost ; but upon a decision that they were mortgaged, and a decree issuing to account for the hires, &c., of them, it was found that L. had received \$1,255, and J. \$330. Upon J.'s death, his administratrix brought an action to recover the excess. Held, that the right to recover was equally enforceable at law and in equity.⁴ So, where slaves were conveyed by an agent who was only authorized to mortgage with notice, with which authority the grantee was held chargeable ; held, the conveyance should be deemed a mortgage only.⁵ So, in *Jewett v. Warren*,⁶ a bill of parcels was made of property valued therein at \$1,602.40, and the vendor acknowledged payment " by indorsing for me at the

¹ *Hickman v. Cantrell*, 9 Yerg. 172.

² *Ballard v. Jones*, 6 Humph. 455.

³ *Carter v. Burris*, 19 Sm. & M. 527.

⁴ *Lambert v. Ingram's Adm'r*, 15 B. Mon. 265.

⁵ *Coppage v. Barnett*, 34 Miss. 621.

⁶ 12 Mass. 300.

Kennebeck Bank for the sum of \$1,350." The property consisted of logs in a boom, and the vendor ordered the witness to the bill to deliver them, and he afterwards showed them to the vendee, but no change took place in the possession. It was held, that the transaction constituted a mortgage or pledge, not an absolute sale. The Court say :¹ — " The bill of parcels is in the usual form practised with regard to merchandise actually sold. But it does not necessarily follow that the parties intended to give the transaction that appearance. The logs are estimated at several hundred dollars more than the note, on which the plaintiff was liable ; and the receipt on the bill shows the consideration to have been the plaintiff's liability only upon a note of hand. It would be impossible to set this up as an absolute sale under these circumstances ; and especially as the parties called a witness to whom the real state of the transaction was communicated, and discovered no disposition to cancel anything." So, in an action of replevin for a carding machine, the plaintiff, to prove his title, produced a bill of parcels, receipted, by which one Bangs professed to sell him the machine for two hundred and forty dollars. The machine stood in the vendor's shop, and was never removed therefrom. It appeared from the testimony of witnesses, introduced by both parties, without objection from either, that the machine was worth two hundred and fifty dollars ; and, the plaintiff having lent eighty dollars to Bangs, that it was agreed that the machine should be conveyed to the plaintiff to secure repayment of that sum ; which was accordingly done by this bill of parcels. Held, the transaction constituted a mortgage.² Mellen, C. J., says :³ — " Though the bill of sale is absolute in form, yet by the report of the evidence introduced by both parties without any objection from either, it is apparent that the conveyance to the plaintiff was intended as his security for the \$80 advanced to Bangs ; and that the plaintiff claimed nothing more than the amount of his demand against Bangs.

¹ 12 Mass. 303.

² *Ib.* 100, 101.

³ *Reed v. Jewett*, 5 Greenl. 96.

The alleged inadequacy of the price is relied on to show that the transaction cannot be sanctioned as a sale; and that the bill of sale being absolute on the face of it, the plaintiff cannot be permitted to claim under it as a mortgage or pledge." But he proceeds to decide, that if the object of the parties was only to secure the plaintiff, the transaction was valid as a mortgage. (*h*)

20. Parol evidence is held more especially admissible, in case of alleged fraud. Thus a written receipt in full for a slave, together with delivery of possession, was held, on parol proof of fraud in making the transaction absolute on its face, to constitute a mortgage.¹ And the distinction is sometimes made, that parol evidence is not admissible at law in favor of the mortgagor, but may be offered by creditors to prove fraud.² So it is held, that in equity fraud is the ground for admitting such evidence between the parties; and that the proof must be clear.³ Also, that *facts* must be proved; mere *declarations* are insufficient.⁴

21. A mortgage of chattels, as of land, may contain a *power of sale*.⁵

22. And this power may be implied from the mortgagee's covenant to account for the proceeds of sales.⁶

23. A writing was made to an officer in this form:— "Turned out and delivered to P. A. one white and red cow, which he may dispose of in fourteen days to satisfy an execution, J. M. v. me. (Signed) W. M." Held, a mortgage, with power of sale.⁷ The Court remark: it was not a mere turning out of property to be levied on, which otherwise

¹ *Farrell v. Bean*, 10 Ind. 217.

² *Hartshorn v. Williams*, 31 Ala. 149.

³ *Sewell v. Price*, 32 Ala. 97. See *Williams v. Cheatham*, 19 Ark. 278.

⁴ *Colvard v. Waugh*, 3 Jones, Equ. 335.

⁵ See *Clark v. Whitaker*, 18 Conn.

543; *Fowler v. Stoneum*, 11 Tex. 478.

⁶ *Abbott v. Goodwin*, 7 Shepl. 408.

⁷ *Atwater v. Mower*, 10 Verm. 75.

(*h*) The mortgage was held to be good as between the parties, though a doubt was expressed, whether the vendee could set it up as against creditors of the vendor. *Reed v. Jewett*, 5 Greenl. 96.

would have been exempt from execution, nor a pledge, which would be extinguished by the party's retaining or regaining possession. "Neither the official character of the plaintiff, nor the fact of his having as an officer any such execution to collect, is recognized or noticed. The writing itself does not import that the plaintiff, as constable, was to levy on the property. The want of delivery, or the re-delivery, shows that a pledge was not contemplated. The only construction which can reasonably be given to the writing, is to treat it as a mortgage, with a power to sell. The defendant was at liberty, at any time within fourteen days, to satisfy the execution. After that time, the property became absolutely the plaintiff's." ¹

24. Where the mortgagee sells under an agreement that he may do so in case of a breach, he is accountable to the mortgagor for the surplus, after paying his own debt, with interest, but not for profits; unless he receive them before the sale.² Nor for the value of the property at a subsequent time.³

25. A mortgagee does not fall within the principle, which forbids a trustee from purchasing at his own sale; but the burden is on him, to show the fairness of his purchase.⁴ And a mortgagee cannot defeat the right of redemption, in equity, by obtaining the property, by means of the mortgage, for less than its value, and less than others would give for it.⁵ So, if a mortgagee with power of sale sell the property, purchase it himself, and resell at a profit; he must account to the mortgagor for such profit, as a trustee.⁶

26. A., being indebted, or liable, to B., on sundry notes or drafts indorsed by C., mortgaged, as security therefor, first to B. and afterwards to C., certain articles of personal property, with power to dispose of them, and to apply the net avails thereof to the payment of such drafts and notes. A., afterwards, on the same day, mortgaged the same prop-

¹ Atwater v. Mower, 10 Verm. 79,
80.

⁴ Black v. Hair, 2 Hill, Ch. 622.

⁵ Goodman v. Pledger, 14 Ala. 114.

⁶ Cunningham v. Rogers, 14 Ala.
147.

² Moore v. Aylett, 1 Hen. & M. 29.

³ Ibid.

erty to D., to secure a debt. The next day, C. made an arrangement with E., the acceptor of the drafts, then in doubtful credit, in pursuance of which C. received from E. sundry other articles, at the prices stated in the invoice, in satisfaction of the acceptances of E. to that amount; but it was also arranged, that C. was to dispose of this property at his best discretion, and apply the avails in payment of the drafts and notes. Under this arrangement, C. sold the property, and applied the avails accordingly; in good faith, in the exercise of sound judgment, and with the expectation of promoting the interests of all concerned. On a bill in chancery, brought by D. against C., for the balance claimed to be in his hands, held, 1. That the arrangement was in the nature of a compromise, by means of which C., as indorser, endeavored to get what he could of the acceptor; 2. That D. need not be party to such arrangement, as the property which was the subject of it was not embraced in his mortgage; 3. That it did not, of itself, operate as payment of E.'s acceptances, so as to discharge the incumbrances thereon; 4. That C. was chargeable, in relation to this property, only for the net avails thereof, and not at the invoice price; 5. That such avails, with the other securities in C.'s hands, being not more than sufficient to remove the prior incumbrances upon the property mortgaged to D., he had no claim on C.; and, consequently, the bill must be dismissed, but without costs.¹

27. A bill of sale, made to secure a debt, with an agreement that the goods shall be sold by the assignee, and the surplus, after payment of the debt, paid over to the debtor; both at law and in equity, constitutes a mortgage.² Wilde, J., says: — "The plaintiff's title is derived from Plympton, by virtue of a bill of sale, in which he assigns and transfers to the plaintiff all his right and property in the goods in question, for the purpose of securing a debt due from him to

¹ *Butler v. Elliott*, 15 Conn. 187.

² *Parks v. Hall*, 2 Pick. 206; *Gor-*

don v. Massachusetts, &c. Ib. 249; *Peters v. Ballistier*, 3, 495.

the plaintiff for money advanced. It appears by the indenture of sale, that it contains no condition upon the performance of which the property was to revest in Plympton; but it was agreed therein, that the goods should be sold by the assignee, and the surplus of the proceeds of sale, after deducting the plaintiff's demand, should be paid over to Plympton. The question first to be considered is, whether this was an absolute sale, or an assignment by way of mortgage. Whether the assignment in this case can in a court of law be treated as a mortgage, is a question of some doubt. I have, however, no doubt it would be so considered in a court of equity. Wherever it appears by the terms of the deed, that a conveyance seemingly absolute was nevertheless intended as a security for a debt, it is always considered in a court of equity as a mortgage; and I can perceive no good reason why it should not be viewed in the same light in a court of law."¹

28. Where a mortgage gives power to sell or manufacture, if the mortgagee exceed such power, he is liable for any loss thereby occasioned, unless his acts are ratified by the mortgagor.² But such ratification has all the effect of a previous authority.³

29. The insertion in the mortgage of a power of sale, and of paying the debt and expenses out of the proceeds, does not prevent the mortgagee from gaining an absolute title at law, upon breach of condition, without any sale,⁴ (i) nor

¹ Per Wilde, J., *Parks v. Hall*, 2 Pick. 210, 211.

³ Ibid.

⁴ *Burdick v. McVanner*, 2 Denio, 172.

(i) A vessel had been mortgaged to secure certain notes, with a clause authorizing the mortgagee to sell on default of payment, and proceedings at law had been commenced thereon. The mortgagee agreed by letter to extend the time upon his mortgage, on condition that the vessel should be run between two particular ports and the net earnings paid over to him. Held, that the mortgagee had not by this agreement waived his right to sell, and that the moment the condition named by the letter was repudiated by the mortgagor, this right revived with all its former force. *Fox v. Kitton*, 19 Ill. 519.

extend the right to redeem until a sale.¹ And the law does not require the mortgagee to avail himself of the power of sale, for the purpose of paying the debt. Thus a seller of chattels may bring an action for the price, though at the sale he took a mortgage therefor, with a power of sale.² So, in trover for a cow, the defendant admitted the taking of the cow, and that she was worth \$18. He then offered in evidence a mortgage of the cow from the plaintiff to one Parker, reciting that the plaintiff owed him \$3, to secure which he transferred the cow, and conditioned to be void upon payment of the debt and interest by a certain day; and that in case of non-payment at the time, the mortgagee might take possession and sell, and pay the debt and expenses from the proceeds. If the mortgagee should at any time deem himself insecure, he was authorized to take and sell the cow at auction or private sale, and pay the debt and expenses from the proceeds. Some months after the day of payment, the mortgage was assigned to the defendant, who afterwards took the cow as such assignee. The plaintiff before bringing a suit tendered the debt and cost, and demanded the cow. Held, by non-payment at the day the mortgagee gained an absolute title, and the mortgagor became a mere bailee; that the mortgagee's title passed to the defendant; and that the plaintiff, having neither a general nor special property, could not maintain trover, although the value was so trifling as not to allow a remedy in equity. The Court further remark:—"This mortgage expressly authorized the mortgagee to sell the mortgaged property and thus satisfy the debt due to him; but it did not require him to do so or forfeit his rights under the mortgage. A power to sell like this is often found in chattel mortgages, but it has never been supposed to extend the time of payment specified in the mortgage, nor under any circumstances to reinvest the mortgagor with title to the property."³

30. The death of the grantee of the mortgagor operates

¹ *Thurber v. Jewett*, 3 Mich. 295.

² *Burdick v. McVanner*, 2 Denio,

³ *Sterling v. Rogers*, 25 Wend. 658. 170, 172.

as a revocation of a power of sale, and a sale can afterwards only be had upon proper proceedings in the probate court.¹

31. Under a statute, which enacts that no mortgage shall be foreclosed otherwise than by action in court, with an exception as to deeds in trust; a power of sale mortgage is within the exception.²

32. The owner of a brig, insured, made a bill of sale of her in common form, the vendee giving back a written memorandum, in which he promised to appropriate the proceeds of the vessel, when sold, to himself, as security for certain indorsements for the vendor, and to pay over the balance, if any, to a creditor of the vendor. Subsequently, further security was given to the vendee, and the memorandum exchanged for an instrument under seal, made for the same purposes, which contained a covenant to make the appropriation above mentioned. Held, the transaction constituted a pledge or mortgage, which left an interest in the mortgagor sufficient to sustain an action upon the policy. The Court say:—"It amounted to nothing more than a pledge or mortgage of the vessel to secure a debt or an indemnity. Admitting that the memorandum not under seal could not for that reason amount in law to a defeasance of the deed of sale; yet if it was so intended between the parties, the covenant which was afterwards substituted would in equity have that effect, so that there can be no doubt that a court of equity would compel a reconveyance of the vessel, if the Hooles should have been indemnified without a sale of her, and if sold, they would be compelled, upon their covenant, to discharge so much of the debts of the plaintiff as her proceeds would amount to, or answer for damages at law upon their covenant."³

33. Mortgage from a firm, to sundry creditors, of personal property, with power to sell, and, after deducting charges and expenses, apply the proceeds to their respective debts.

¹ *Buchanan v. Monroe*, 22 Tex. 537.

³ *Gordon v. Massachusetts, &c.* 2

² *Fanning v. Kerr*, 7 Clarke, (Iowa,) Pick. 249, 259.

The defendants, a firm embraced in the mortgage, took possession, with consent of the other creditors. Previous to the mortgage, the mortgagors, having a lien upon certain sheetings, attached them for a debt. The defendants gave the attaching officer a bond, for delivery of the sheetings to him on termination of the suit, and took possession. The mortgage included both the debts sued upon, and the sheetings. The remaining interest of the debtor in the sheetings was also subsequently assigned to the mortgagees, and the bond of the defendants cancelled; and they afterwards sold and received the price of the sheetings. A part of the mortgagees bring a bill in equity against the defendants, in behalf of themselves and the others, praying for an account of the sale of the property mortgaged, and for their share of the proceeds. Held, the bill would lie, being necessary in order to ascertain the amount due to each mortgagee; that the defendants could not disclaim the trust once assumed in the sale of the sheetings, but must account for the proceeds; and that the Court might in its discretion allow costs to the plaintiffs.¹

34. The assignee of part of a debt secured by mortgage, with a right to sell, can only sell so much of the property as will cover the assigned interest, and cannot sell the whole or sufficient to cover the entire mortgage debt.²

¹ Norton v. Ladd, 22 Conn. 203.

² Emmons v. Dowe, 2 Wis. 322.

CHAPTER XXXIX.

CONSIDERATION OF A MORTGAGE. THE DEBT OR LIABILITY
SECURED.

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|---|---|
| 1. Mortgages of real and personal estate compared. | 11. Construction of the terms used to describe the mortgage debt. |
| 2. Proof of consideration. | 13. Mortgage to secure future advances. |
| 3. Preëxisting debt. | |
| 4. Mortgages of <i>indemnity</i> . Condition, how stated; parol evidence, &c. | |

1. MORTGAGES of personal property, with respect to the *consideration* on which they are founded, or the *debts* or *liabilities* which they are made to secure, do not materially differ from mortgages of real estate. Where the mortgage is an instrument not under seal, as we have already shown it may be, (ch. 38,) some technical distinction may perhaps arise from this source, as to the necessity of positive proof of consideration, which is always *implied* in case of a *deed*. But, in general, the principles already stated upon this subject, in former chapters, may be considered as equally applicable to both classes of mortgages.

2. It is held, that, as between a purchaser of the mortgagor's interest and the mortgagee, no proof of consideration beyond the recital in the mortgage is requisite, in a suit involving simply the title to the property.¹

3. A preëxisting debt is sometimes held an insufficient consideration.² More especially where the mortgagee parts with nothing, relinquishes no security, and incurs no liability upon the faith of the mortgage; and as against the true owner of the property.³ But a previous debt is held *evidence* of consideration for the jury.⁴

¹ Webb v. Mann, 3 Mich. 139.

² Boyd v. Beck, 29 Ala. 703.

³ Woodburn v. Chamberlin, 17 Barb. 446.

⁴ Ferguson v. Clifford, 37 N. H. 86.

4. *A liability to pay the debt of another*, upon a subsisting contract, is sufficient consideration for a mortgage or pledge to the party thus liable; and the validity of the transaction does not depend upon the comparative amount of the consideration and of the property conveyed.¹

5. In case of a mortgage made to indemnify the surety upon a note, as the note cannot be presumed to be in the mortgagee's possession, he need not produce it, in order to establish a *primâ facie* title to the property, but only the mortgage itself.² (a) So a mortgage purported to be made, as security for a note, dated on or about the 1st of February last, on which the mortgagor was principal, and the mortgagee surety, jointly and severally promising to pay \$500 to one Taylor. In an action against an officer, who attached the property as the mortgagor's, the mortgagee produced a note for \$500, dated January 25th, signed by the plaintiff, payable to the mortgagor or order, and indorsed by him. The mortgagor testified, that the note was made to enable him to procure the money from Taylor, which he did; that the mortgage was afterwards made to secure the plaintiff for his liability; and that the plaintiff had paid the note. Also, that this was the only note ever signed by the plaintiff for him. Held, this evidence was admissible, and that the action was sustained.³ The Court say: ⁴ — "Proof of the execution and

¹ Jewett v. Warren, 12 Mass. 300.

³ Davis v. Mills, 18 Pick. 394.

² Davis v. Mills, 18 Pick. 394. See
Law v. Allen, 41 Maine, 248.

⁴ Ibid. 395.

(a) In Maine, the same rule has been applied in case of a mortgage given for a debt due directly to the mortgagee himself.

Trover for a wagon. The owner of the wagon mortgaged it to the plaintiff to secure a note, and afterwards sold it to the defendant. To prove title, the plaintiff introduced the mortgage, which had been duly recorded; but offered no other evidence, neither was any offered by the defendant. The defendant claimed, that the note must be produced, or proof offered of the mortgagor's indebtedness upon it. Held, this was unnecessary. Howard, J., says: — "The production of the mortgage was evidence *primâ facie*, of property in the plaintiff. If the defendant would rely upon a payment of the mortgage debt, the burden of proof was on him." Brooks v. Briggs, 32 Maine, 447, 448.

registry of the mortgage is *primâ facie* evidence of title. It is for the defendant to show it avoided, by proving performance. The plaintiff has no occasion to produce or prove the note, because he does not hold it; it is not presumed to be in his possession, and the condition is to indemnify him against the payment of a note, on which he was surety for the mortgagor, and held by a third person. It is then for the defendant to avoid the title made under this mortgage, and to show that the note had been paid, or the plaintiff released, or that for some cause the plaintiff could not be damnified. To do this, he must offer and rely upon the parol proof stated in the case. If admitted, it proves that there was no other note than the one described as held by Taylor, and that that was the note intended in the mortgage; if rejected, it would leave the *primâ facie* title upon the mortgage unimpeached; and on either ground the plaintiff is entitled to recover." So, in an action of replevin, the plaintiff claimed the property under two mortgages from Sperry; the defendant, under process of law against Sperry. The mortgages appeared to have been made to indemnify the plaintiff as surety for Sperry on a note for \$236; but the plaintiff produced a note for \$256; and then offered to show that he never signed any other note as surety for Sperry; that the mortgagee had not been discharged, but he was still liable as surety. The defence was, that the mortgages were fraudulent as against creditors, or, if not, had been satisfied. Held, the evidence offered was competent. Putnam, J., says:—"The questions were, whether the mortgages were fraudulent, and whether they had been paid. As between the parties to the note and the mortgages, it was certainly competent to correct any mistake that had arisen in the conveyancing. The mistake would not make the transaction fraudulent. But the defendant contended, that as no note was produced exactly corresponding with that mentioned in the mortgages, the presumption would be, that there was such a note once in existence, but that it had been paid or discharged. It was, we think, perfectly competent for the plaintiff to rebut this presumption

by the parol evidence. It was a broad question of fraud, or of payment and discharge; and such evidence, we think, was clearly applicable, especially between the parties who are now contending.”¹

6. In case of a mortgage for indemnity, the mortgagee's title to the property does not depend upon his having actually paid the debt, or being solely liable therefor. Thus, in case of a mortgage of indemnity from the promisor of a note to one of three sureties; the mortgagor afterwards became insolvent; the assignee of his estate took and sold the property; and the mortgagee brings trover against him. Held, the action was maintainable, to recover the proceeds of the sale, to the amount of the plaintiff's liability on the note; although he had paid no part of it, and the other sureties were equally liable with him, and though the consideration expressed in the mortgage was only equal to one third of the amount for which the note was given. Also, that parol evidence was inadmissible, to prove the mortgagor's intention to secure the plaintiff only to the amount of one third of the note, under the belief that this would fully indemnify him for his liability.²

7. In a mortgage of indemnity, the form of the mortgagee's liability need not be stated with precise accuracy, provided the intention is made to appear. Thus a mortgage was made, reciting that “said Wheeler, Deming & Horton have at various times indorsed for the said C. & J. S. Bedlow (the mortgagors) certain and various notes of hand and drafts, checks, &c., made and drawn at various times during the past six months. Now if the said, &c., shall pay, &c., where the said Wheeler, Deming, & Horton are holden as security, and shall release them from all liability, &c., then,” &c. Held, this mortgage was a valid security, and the mortgagees might join in an action of trespass, although no two of the mortgagees were liable upon any paper.³ Tenney, J., says: ⁴ — “It is contended that the plaintiffs would have

¹ *Johns v. Church*, 12 Pick. 557, 560.

² *Barker v. Buel*, 5 Cush. 519.

³ *Wheeler v. Nichols*, 32 Maine, 233.

⁴ *Ib.* 235.

no claim upon the goods, excepting as an indemnity for joint liabilities. In giving a construction to the mortgage, the design of the parties thereto must be sought. In this inquiry, the subject-matter to which it refers and the situation of the parties may be taken into consideration. The parties had a purpose in its execution; neither is presumed to have intended a void instrument. It not appearing that the mortgagees had assumed any joint liability, it cannot be restricted in its construction to any such liability. The terms 'certain and various,' &c., are used collectively, and it was intended to be said that upon them, taken collectively, were the indorsements of each and all of the mortgagees."

8. But in case of a note on demand, and a foreclosure without demand, it cannot be shown by parol evidence that the mortgage was given for indemnity. Such evidence might be admitted in a suit on the note; but the form of the mortgage is held to indicate an immediate claim upon the property.¹ So, although a note for a given sum may be valid as an indemnity for a contingent liability; if a mortgage is given to secure such note, the true character of the note as an indemnity must be stated in the condition. If stated as a debt in the condition and affidavit, it will be invalid as to creditors. So if the whole sum secured is described as a debt, when a part of it is merely an indemnity, the whole will be invalid, against creditors, whether there is any fraudulent design in the misdescription or not.²

9. A transfer made for the purpose of indemnity will be treated as a mortgage from the principal debtor, and not as a sale to the surety by the vendor of the property, for the price of which the liability is incurred. Thus a manufacturer purchased wool, to be paid for by his note, indorsed by a third person. The note was accordingly made, and indorsed for the accommodation of the purchaser, who at the same time gave to the indorser a writing, reciting the indorsement of a note to be used in the purchase of wool, and

¹ Southwick v. Hapgood, 10 Cush. 119. ² Belknap v. Wendell, 11 Fost. 92.

declaring that the wool and the cloth to be manufactured therefrom should belong to the indorser till payment of the note. Held, the writing was a mortgage, and, not having been filed as such in the town clerk's office, was void against a subsequent *bonâ fide* purchaser from the mortgagor; more especially as the indorser was proved to have required from the purchaser *additional security*.¹ Jewett, J., says: ²—“ Whatever title he (the indorser) got to the wool, he derived it from Wheeler (the purchaser) and not from Hall (the vendor.) Wheeler contracted with Hall for the purchase of both lots on his own account, upon a credit of six months, upon condition that he secured the payment of the price by indorsed notes; and although Hall delivered a part of the first lot of wool purchased before the condition was performed, yet the property did not vest in Wheeler until the condition was performed, but then it did. The transaction, as I think, was between Hall and Wheeler, and amounted to a sale and delivery by the former to the latter. There is no ground to say that Thompson agreed to take the wool at its value, or at any price, and pay the notes himself, and so discharge Wheeler from his liability as maker. The terms of the conveyances clearly imply that they were made to secure Thompson as indorser. He was to own or have title to the wool, or cloth if manufactured, no longer than the notes remained unpaid by Wheeler.”

10. A mortgage of indemnity will be so construed, as to save the mortgagee harmless from all expense and trouble connected with or growing out of his liability. Thus the plaintiffs gave a bond to one Fletcher for the benefit of the defendant, who gave the plaintiffs a mortgage of a horse and other property, conditioned to secure them harmless, and indemnify them from all costs, trouble, and expense, which they might be put to in consequence of having signed the bond. The plaintiffs having been compelled by suit to pay a sum of money on the bond, and to incur trouble and expense in getting possession of the horse under the mort-

¹ Thompson v. Blanchard, 4 Comst. 303.

² Ibid. 307, 308.

gage; held, by virtue of the condition, they were entitled to recover compensation for such trouble and expense.¹

11. Questions sometimes arise, in other mortgages than those of indemnity, as to the effect of the terms used in a mortgage, describing the personal liability which is meant to be secured. (b) And the general rule is, that it is not neces-

¹ *Robinson v. Hill*, 15 N. H. 477.

(b) If no particular time is specified for the payment of a sum secured by mortgage, it will be payable in a reasonable time; and upon non-payment the mortgagee may foreclose. *Farrell v. Bean*, 10 Md. 217.

Under a chattel mortgage to recover two notes, one overdue and one not due, with condition to pay when payment should be demanded; Held, 1. That an extension of credit on the notes was implied from the contract; 2. That the mortgagor had no right of possession until demand made. *Carpenter v. Town, Hill & Denio*, 72.

Where, as by Conn. Rev. Stats., title 20, § 4, a mortgagor may retain possession of furniture, the mortgage being recorded like a mortgage of land; such mortgage is invalid, unless the debt is properly described. *Rood v. Welch*, 28 Conn. 157.

A mortgage in trust, executed by a calico printer, amongst other things provided, that the trustee should pay "all sums now due or which may become due from said Patterson (the mortgagor) to himself, the said Pierce, and to all other persons now or heretofore employed, or to be employed by me, for the labor or other service of all such persons in operating said print works, or in doing the teaming to and from said print works, and in any business of or connected with said print works, whether there or elsewhere; but not including any persons who may have been employed in putting in machinery, or fitting up the same, in said print works, or in the management of said print works, as manager or overseer thereof; and not including a note given by me to Samuel McElroy, until he discharges me from the indorsement by me of a note for him." Held to include the amount due to one for services performed under a sealed contract, by which the mortgagor had engaged him, in consideration of a stipulated percentage on the gross amount of sales of all prints made at the works, to aid in getting up the styles of his prints, and to superintend that branch of his business in Providence and New York; to assist him in the purchase of cloths, drugs, and coal; to make needful arrangements with his selling agents; to superintend the sales and the rendition of the accounts of sales of prints; to aid him in the procuring of job-work; and generally to advise him in his business, except professionally.

sary to state all the particulars of the note secured, but only to describe it with reasonable certainty.¹ Thus a mortgage to secure a note, according to its tenor, payable at a day which is passed, is held a valid security for payment of the note in its then existing condition, or on demand.² And where a note is offered in evidence, in connection with a mortgage, in order to identify it as the note intended, if

¹ *Webb v. Stone*, 4 Fost. 282.

² *Pettis v. Kellogg*, 7 Cush. 456.

Also, interest on all sums due, from the time they become due by agreement, for service and labor protected by the mortgage, although such interest be not expressly stipulated for, but accrue by way of damages for default of payment; the law, in this country, annexing interest as an invariable incident in all cases of default to pay the principal sum, when the debtor knows what the principal sum is, and when he is to pay it. But not to include fees due to attorneys and counsellors-at-law for defending suits brought against the mortgagor, in which his goods in the hands of his agents had been attached, or for giving him advice in matters of law relating to his business. *Spencer v. Pierce*, 5 R. I. 63.

A. contracted to build a tunnel for B., a certain sum to be reserved from the price, which was payable in instalments, and forfeited upon failure to comply on notice with certain directions which B.'s engineer was authorized to give in a certain contingency: B. paid A. the reserved money, taking from him a mortgage on personal property, conditioned that the contract should be fully performed or the money refunded. A.'s creditors attached the property and advertised it for sale on execution. On a bill by B. to enjoin the sale, and for a sale to pay his own mortgage with priority over the creditors; held, the mortgage was not to secure general performance of the contract, but could only be resorted to upon a forfeiture, according to the contract, of the money originally reserved, and, as the engineer had done nothing to cause a forfeiture, the bill must be dismissed. *Long Dock Co. v. Mallery*, 1 Beasl. 93. But, (by a majority of the court,) on appeal, that the reserved fund and the mortgage were to secure B. against any default on the part of A. which would be a good defence in whole or in part to payment of the contract price, and not merely against the particular defaults enumerated in the reservation clause. S. C. ib. 431.

A clause in a mortgage by A. and B. to C., reciting that C. had taken separate notes for a sale to them, for which the mortgage was agreed to be given as security, and that they promised to pay the whole sum as above, does not change their liabilities as expressed in the notes. *Kelley v. Maxwell*, 7 Ohio, (N. S.) 239.

there is a general description of the note, this is *primâ facie* evidence that it is the note referred to, though the note contain additional particulars, or be signed by other parties than the mortgagor. Thus a mortgage described the note as a note for \$625, signed by the mortgagor, payable to the mortgagee or order on demand, with interest annually, and of even date with the mortgage. The note produced was of the same date and amount, and payable to the mortgagee or order "in teaming, on demand, with interest annually, from Warner to Boston, at the following prices," with a further stipulation as to forwarding in part by railroad, and was signed by the mortgagor and two others. Held, the note was *primâ facie* the one secured.¹ So, in case of a mortgage to secure the payment of "\$50 in sixty days from the date hereof, meaning and intending the legal demands they have against me;" held, the condition was not void for uncertainty; meaning that it was to secure the sum due, not exceeding \$50.² Gilchrist, J., says,³ in reference to the objection, that creditors could not ascertain from the form of this mortgage the amount of the debt due: "Whether this be an important object or not, it certainly is not attained in any case where a part of the debt has been paid since the registry of the mortgage. At the date of the registry the debt may be a hundred dollars. This may be reduced by payments on the next day to fifty dollars; but this fact, and consequently the amount of the incumbrance, cannot be ascertained from the record, as the law does not require, nor is it the custom, that any subsequent payments should appear of record. The proper construction of the condition is, that the sum to be secured is the amount actually due, not exceeding fifty dollars. If the amount actually due refer to the claims existing at the end of sixty days, then, as there was a debt due at the date of the mortgage, we are of opinion that the mortgage is not void. Or if by this is meant the sum due at the

¹ Robertson v. Stark, 15 N. H. 109.

³ Ibid. 254, 255.

² North v. Crowell, 11 N. H. 251.

date of the mortgage, we see no more practical difficulty in ascertaining that sum than in ordinary cases, where the amount of the debt has been reduced by subsequent payments. If the condition had been only to secure the payment of ‘\$50 in sixty days from the date hereof,’ no question would have arisen as to its meaning; and we do not conceive that the addition of the words ‘meaning,’ &c., at all increases the difficulty of understanding its meaning.”

12. A mortgage, purporting to be made to three persons, to secure payment of a several debt to each of them, if delivered to one of the mortgagees, becomes the deed of the mortgagor for all the purposes expressed in it, and cannot be restrained by the use of words on the part of the mortgagor, so as to make it take effect, as his deed, to one of the mortgagees only, and not as to the others. Thus it is not competent to show by parol evidence a delivery to this mortgagee for his exclusive benefit.¹ Shaw, C. J., makes a distinction between this case, and the admitted right of a party to prove, in avoidance of the effect of a deed, that, although regularly executed, it came into the grantee’s hands by fraud or accident, and was never delivered to any one. He says:² — “The instrument purports to be a conveyance of the whole property described to the three grantees and their assigns, on one consideration, moving from them all, but paid in different proportions; a conditional transfer defeasible upon the payment of several sums to each of them. Such a conveyance vested in them an interest in the goods, and whether this interest is technically a joint interest or an interest in common, is wholly immaterial. It enures to their common benefit; and should the mortgage never be redeemed by the payment of the debts, but be foreclosed, the mortgagees would hold the absolute property in the goods, in the proportion of their respective debts. This being the character of the instrument, by the delivery of it to one of the grantees, to enure as his deed to such grantee, it thereby became the deed of the grantor for all the purposes expressed in it. It

¹ Hubby v. Hubby, 5 Cush. 516.

² Ibid. 518, 519.

makes no difference that the grant was defeasible upon the payment of several sums to the several mortgagees. This might affect the right of redemption, and the mode of obtaining a discharge of the mortgage. But the question here is as to the effect of the deed, before redemption, upon the right of property; and we have no doubt, that it vested a right of property in all the mortgagees, either as joint tenants or tenants in common."

13. A mortgage of personal property, to secure an existing debt *and future advances*, is valid.¹ If a further loan be made on account of the mortgage, and further time given, this may be shown by parol evidence.² Such mortgage is valid for the sum due at the time the mortgagees assert their title.³ More especially, a mortgage for future advances, in addition to an existing debt to *a limited amount*, is valid.⁴ So although no consideration be paid at the time for the note, but the note is only to secure future advances.⁵ So if a debtor gives a mortgage for a larger sum than the debt, purporting to be due, but in fact partly with a view to future advances; it is in any case good for the actual debt.⁶

14. A mortgage to secure advances to be made by a firm will cover advances made by that firm both before and after the admission of a new partner.⁷ But a mortgage for future advances is not valid for advances made to the successors of a firm.⁸ And where a mortgage gives a false account, and is vague and indefinite as to the amount of indebtedness; where the state of the account is not known till the property is taken by a creditor; where a whole stock in trade is mortgaged, and the mortgagor remains in possession, continuing his business, selling the stock, and continuing to do so till the mortgage becomes absolute and for more than two years and a half after, without accounting to the mortgagee,

¹ Holbrook v. Baker, 5 Greenl. 309; Atkinson v. Maling, 2 T. R. 462; North v. Crowell, 11 N. H. 255; Googins v. Gilmore, 47 Maine, 9; the Michigan, &c. v. Brown, (Mich.) Law Reg. 1863. See Spence v. Pierce, 5 R. I. 63.

² Kent v. Allbritain, 4 How. (Miss.) 317.

³ Fairbanks v. Bloomfield, 5 Duer, 434.

⁴ Lawrence v. Tucker, 23 How. U. S. 14.

⁵ Ibid.

⁶ Wescott v. Gunn, 4 Duer, 107.

⁷ Lawrence v. Tucker, 23 How. 14.

⁸ Monnot v. Ibert, 33 Barb. 24.

and the knowledge of the mortgage is confined to one or two individuals; the mortgage is fraudulent and void as to creditors, however honest may have been the intentions of the parties. The question is for the Court, not for the Jury.¹ (See *Delivery.*) (c)

15. Upon this subject Judge Story remarks, adverting to the distinction between real and personal property:—"In the case of a mortgage or pledge of chattels, the general rule, or at least the general presumption, seems the other way. For it has been held, that in such a case, without any distinct proof of any contract for that purpose, the pledge may be held, until the subsequent debt or advance is paid, as

¹ *Divver v. McLaughlin*, 2 Wend. 596.

(c) A bank, having a mortgage on slaves, duly recorded, afterwards discounted for the mortgagors another note, when an agreement, that the bank should have a lien upon the slaves, for the payment of the note, was indorsed on an unrecorded mortgage. Held, that the bank, having an equity equal to that of an intermediate mortgagee, and a prior legal title, should be protected against the intermediate mortgage as to such note, but have no lien as to a note which was not a continuation of one secured by the first mortgage. *Bank, &c. v. Vaunce*, 4 Litt. 168.

The following remarks of an eminent English judge, upon the subject of *tacking*, (see ch. 12,) relate immediately to personal property, and may properly be inserted in this connection.

"I have looked into all the cases, which are very dissatisfactory. The present practice, that a bond cannot be tacked to a mortgage as against the mortgagor, but may against his heir, does not seem to have been always the course. In *Baxter v. Manning*, 1 Vern. 244, it was held, that the mortgagor must pay both. In *Shuttleworth v. Laywick*, (*Laycock*), 1 Vern. 245, it was held, that the heir should not redeem without paying both. Now, at least by the modern cases, it is laid down, that the mortgagee cannot tack a bond against the mortgagor, nor against creditors, but may against the heir, merely to prevent circuitry of action. Why not against the mortgagor, if the rule is, that where a man having one security lends more money to the same person, that person shall pay his whole debt, or shall not redeem at all. That is not the rule; for otherwise it would bind him. It does appear now to be the rule, that a bond cannot be tacked as against the mortgagor; but that if two separate estates are mortgaged, this Court will not interpose in favor of the redemption of one without the redemption of both." Per Sir Richard Pepper Arden, M. R., *Jones v. Smith*, 2 Ves. 375, 376. See *Marcon v. Bloxam*, 34 Eng. Law & Eq. 475.

well as the original debt. The ground of this distinction is, that he who seeks equity must do equity; and the plaintiff, seeking the assistance of the Court, ought to pay all the moneys due to the creditor, as it is natural to presume that the pledgee would not have lent the new sum, but upon the credit of the pledge, which he had in his hands before. The presumption may indeed be rebutted by circumstances; but, unless it is rebutted, it will, generally, in favor of the lien, stand for verity against the pledgor himself, although not against his creditors, or against subsequent purchasers.”¹

¹ 2 Story's Eq. s. 1034.

CHAPTER XL.

NATURE OF THE PROPERTY MORTGAGED.

- | | |
|--|---|
| 1. Whether personal or real — <i>transient</i> or <i>perishable</i> property. 3. Building, as distinct from, or connected with, land. | 4. Grass. 5. Growing wood. 7. <i>Fixtures</i> . 15. Chattels real. |
|--|---|

1. IN general, all personal as well as real property may be the subject of mortgage. (See ch. 1.) "There may be chattels so *transient* in their existence, or of such a nature, their only use consisting in their consumption, that they cannot be mortgaged." But stock, farming tools, hay, oats, manure, &c., are held not to be of this description. And, if they were, a mortgage including other property with them would be valid for the other property.¹ And a mortgage is not necessarily fraudulent because the property consists in part of perishable articles.² So the profits arising out of a personal chattel are the subject of mortgage.³

2. One question, however, of not unfrequent occurrence is, whether the thing mortgaged is personal or real; the law requiring distinct formalities of execution, and more especially of registration, in the two cases. (*a*)

3. Where the owner of land gives a bond to convey it, upon payment of a certain sum within a certain time by one who erects a building upon the land; such building is not personal property, a mortgage of which requires to be re-

¹ *Shurtleff v. Willard*, 19 Pick. 202, 211, 212.

² *Googins v. Gilmore*, 47 Maine, 9.

³ *Sims v. Canfield*, 2 Ala. 555.

(*a*) See *Regina v. Trustees, &c.* 16 Eng. Law & Eq. 276.

corded under the statute, or which will be forfeited to the mortgagee, under Rev. Stats. ch. 107, § 40, in sixty days after breach of condition.¹ The Court say,² "It is true to a certain extent" that the property was personal property, "but not true absolutely. It was *like* personal property; it was an interest in the buildings, but not an ownership of the soil. The true nature of that interest seems to have been this: The buildings were erected under an agreement with the owner of the soil to convey the land at a certain price, within a limited time. They were, in truth, fixtures, and constituted a part of the realty. The interest of the builders was a right to obtain a title to the soil, and thus unite the fixtures with the fee. It was, therefore, an equitable interest in the realty, not a pure ownership of the buildings as chattels." The property could not have been attached or levied on as chattels, to be removed; it was not, therefore personal property "in that sense in which personal property is regarded as subject to the process of law for the payment of the owner's debts, and for the exemption of which from attachment, when mortgaged, the mortgage must be recorded in the town clerk's office." So, in case of a mortgage of land, with a dwelling-house thereon, the mortgagor removed the building, used a part of the materials, with others, in erecting a house upon other land, and afterwards conveyed the land and building last named. The mortgagee brings trover against the purchaser for the new house and the materials used upon it. Held, such materials became part of the freehold, and vested in the purchaser, and the action would not lie.³

4. A mortgage of *growing grass*, by the owner of the land, does not work a severance till it becomes absolute.⁴ But *grass*, owned by one who is not the owner of the land upon which it grows, is personal property, and may be mortgaged and sold as such.⁵ Thus in trespass, for taking a quantity of hay, purchased by the plaintiff at a sale on an execution

¹ Eastman v. Foster, 8 Met. 19.

² *Ib.* 26.

³ Peirce v. Goddard, 22 Pick. 559.

⁴ Bank, &c. v. Crary, 1 Barb. 542.

⁵ Smith v. Jenks, 1 Denio, 580.

against one Arnold, the defendant set up a chattel mortgage from Arnold of six acres of grass growing on the land of one Hunt, being the same from which the hay was made. The hay was cut by the mortgagor, and stacked upon other land of his. The defendant had paid him for this service. No delivery had been made to the defendant, but the mortgage was filed for record. Held, the action did not lie. The Court say : — “ Growing grass, as a general principle, does not come within the description of goods and chattels, and cannot be seized as such under an execution against the owner of the land. It goes to the heir, and not to the executor.” Otherwise, where the lands are owned by one person and the growing grass by another.¹

5. A mortgage of growing *wood and timber*, made by a purchaser of the same, is a mortgage of personal property, to take effect when the wood is severed from the freehold; and is to be recorded in the town clerk's office, not the registry of deeds.² Thus, in an action of trover, the plaintiffs, to prove their title, offered in evidence a mortgage deed of all the wood and timber, cut and uncut, which the mortgagor had bought of them, to secure a certain sum. The mortgage was recorded in the office of the town clerk (where the mortgagor lived) but not in the county registry. The plaintiffs also proved, that on the same day they sold the wood and timber to the mortgagor; that he sold a part of it to the defendant: and that the plaintiffs showed their deed to him and demanded the property. Held, the action should be maintained, upon the general ground above stated. The Court, however, further remark : — “ There is also another ground, on which we think this action may be maintained. If the mortgage was void or voidable by the statute of frauds, so was the sale; and McDavit obtained thereby no title to the land, and the trees were the property of the plaintiffs, both before and after they were severed.”³

¹ *Smith v. Jenks*, 1 Denio, 580.

² *Claffin v. Carpenter*, 4 Met. 580;
Douglas v. Shumway, 13 Gray, 498.

³ 4 Met. 583, 584.

6. Where the owner of land conveyed the timber and wood growing upon it, taking back a defective mortgage which was not recorded; held, his constructive possession, as owner of the land, was not notice of his claim to the timber and wood, as to a party purchasing upon the faith of his bill of sale. Nor an entry upon the land, and taking formal possession of the wood and timber. But a mortgage, of which a purchaser has notice, though defective against a *bonâ fide* purchaser, if valid between the parties, will be so against him.¹ (b)

7. Questions often arise in relation to *fixtures*, which are claimed either by a mortgagee of the land as incident thereto, or by the party, or a mortgagee or creditor of the party, by whom they were erected, as personal property belonging to him.

8. Fixtures erected by a mortgagor on the mortgaged land are annexed to the freehold, and cannot be removed by him before payment of the debt; and the removal of them by the mortgagee, after the mortgagor's death, does not vest the title in the mortgagor's personal representative.²

9. Where a mortgagor began to erect, upon the mortgaged land, a building intended for a dwelling-house, and to stand there, and also a smaller building, upon posts fixed in the ground, and intended for a dwelling-house till the other should be finished; held, both the erections were fixtures.³

10. Fixtures may be separately mortgaged. Thus a person gave a memorandum, that he had deposited a lease of a house with another, and had assigned the fixtures therein to him, as security for a sum paid on his behalf, with a power

¹ Patten v. Moore, 32 N. H. 382.

³ Ibid.

² Butler v. Page, 7 Met. 40.

(b) In New Hampshire, by statute, personal property, and crops of any description, whether the same have or have not come to maturity, are subject to mortgage. N. H. Comp. L. ch. 138, § 1.

This is said to be in affirmance of the common law. Per Nesmith, J., Cudworth v. Scott, 41 N. H. 460.

As to the recording of such mortgage, whether real or personal, Ib. 462.

to enter upon the premises and sell the fixtures. Held, an absolute assignment of the fixtures by way of mortgage.¹

11. And, on the other hand, a mortgage of the land passes fixtures annexed to the freehold, though not named; unless excluded expressly or by inference, as by mentioning those in only a part of the premises.² Thus fixtures erected on premises leased for years pass by a mortgage of the land.³ So a steam-engine, erected in a permanent manner in a tannery, to facilitate the process of tanning, and used for that purpose for two or three years, but which could not be removed without injury to the building, with which it is connected by braces, is a fixture, and passes by a mortgage of the land.⁴ So a lessee erected trade fixtures, consisting of *coke-ovens*, of iron and brick-work, with a chimney-shaft firmly attached to the freehold, but removable, as between him and the lessor. He then mortgaged the premises by way of demise by the same description as that in the lease, without referring to the fixtures, the sum secured being a floating balance, limited to an amount exceeding the value of the premises without the fixtures. The mortgagor having become bankrupt, held, the mortgagee was entitled to the fixtures.⁵ Sir John Cross says: ⁶ — “The counsel for the assignees rely mainly on the case of *Trappes v. Harter*,⁷ from which, among a confused mass of facts, it may be collected as a rule of law, that a tenant’s fixtures, not expressly included in a mortgage deed, do not pass to the mortgagee, if it appear it was not intended by the contracting parties that they should so pass. Now there is nothing to the contrary in the deed. The mortgaged deed in terms conveys to the mortgagees ‘all the land, messuages, and tenements, with the appurtenances, and all other the premises demised by or comprised in the deed.’ Now, although two only of the *coke-ovens* are actually demised by the lease, yet the rest are comprised therein, and are a subject-matter thereof, and are

¹ *Thompson v. Pettitt*, 10 Qn. B. 101.

² *Hare v. Horton*, 5 B. & Ad. 715.
See *Longstaff v. Meagoe*, 2 Ad. & Ell.

167.

³ *Day v. Perkins*, 2 Sandf. Ch. 359.

⁴ *Sparks v. State*, &c. 7 Blackf. 469.

⁵ *Bentley*, 2 Mon. Dea. & DeG. 591.

⁶ *Ib.* 597, 598.

⁷ 2 Cr. & Mees. 153.

appurtenant to the land." So a clapboard machine and a shingle machine were fastened into a saw-mill, remained there, and were always used with the mill. The machines were mortgaged, and the mortgage recorded in the town clerk's office, but not in the county registry of deeds. Subsequently, an execution was levied upon the land, mill and appurtenances. Held, the machines passed with the land.¹ So if a shingle machine, and the apparatus attached to it, are put into a mill by the mortgagor, it becomes part of the freehold, and passes to the mortgagee upon foreclosure.²

12. But, on the other hand, where there was a mortgage of a manufactory and its appurtenances, and the mortgagor remained in possession; carding machines, so connected that they could be removed and used in another building, were held to be personal property, attachable in a suit against the mortgagor.³ (c)

¹ Trull v. Fuller, 28 Maine, 545. See
Trappes v. Harter, 2 C. & M. 133.

² Corliss v. McLagin, 29 Maine, 115.

³ Gale v. Ward, 14 Mass. 352.

(c) The following points have been decided, in a case where personal property was mortgaged in connection with real estate.

Where the mortgagees of the unfinished stock of a manufactory had possession of the premises about fifty days, for the purpose of completing the stock, that it might be sold and the wages of the workmen paid, which was done; held, the enhanced value of the goods was a sufficient accounting for the rent. Kellogg v. Rockwell, 19 Conn. 446.

Mortgage by a corporation to the defendants of its real estate, machinery, tools, and stock on hand, to secure certain debts and liabilities. The defendants took possession, except of certain coal and wool. The coal had been purchased on credit for the corporation, and left on the seller's wharf, whence it was taken, as wanted for use. The defendants demanded the coal remaining on the wharf, but the seller refused to deliver it, claiming a lien for the price. The wool was bought a few days before the mortgage, weighed, a bill of sale made out, and the notes of the corporation taken for the amount, but it remained in the store of the seller. When the defendants demanded it, the seller retained it under a claim of right as security for his debt; and the defendants never came in possession of either the coal or wool. Held, they were not chargeable with the value of these articles, upon a bill to redeem brought against them by subsequent mortgagees. Ibid.

13. In case of doubt whether the machinery in a building is covered by mortgage, the Court will prevent its removal till the question is settled. To a proceeding for determining the point, the mortgagor should be a party.¹

14. It is not necessary that machinery in a factory should be particularly described in a mortgage, where it is mortgaged with the factory and possession is delivered to the mortgagee.²

15. The *intermediate* kind of property, known as *chattels real*, may be the subject of mortgage. Mortgage by a husband of his wife's equitable chattels real. The mortgagor died, leaving the wife, without paying the mortgage debt. Held, it appearing that the only intention on the part of the mortgagor, as gathered from the instruments executed by him, was to secure the mortgage debt, and not to reduce the chattels into his possession; the wife, by survivorship, was entitled to the equity of redemption.³ (*d*)

¹ *Hutchinson v. Johnson*, 3 Halst. Ch. 40.

² *Howe v. Keeler*, 27 Conn. 538.

³ *Clark v. Burgh*, 2 Coll. 221.

(*d*) As to the mortgage of a *slave*, see *Sullivan v. Hadley*, 16 Ark. 129; *Rebards v. Cooper*, *Ib.* 288. Of a mortgage, *Rogers*, 35 Eng. Law. & Eq. 611. Of a policy of insurance, *Maria*, &c. 7 Eng. Law & Eq. 268.

CHAPTER XLI.

MORTGAGE OF SHIPS.

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| <p>1. The <i>maritime</i> law.</p> <p>2. Form of the mortgage; English statutes of <i>registry</i> and <i>enrolment</i>; discussions as to their effect upon the validity of the mortgage of ships.</p> <p>10. Not applicable in the United States.</p> <p>11. Decided cases; effect of a mortgage upon the title of the ship; whether the mortgagee is liable for repairs and supplies, before taking possession.</p> | <p>16. When the mortgagee becomes liable.</p> <p>17. Whether liable to the master.</p> <p>18. Whether the mortgagee may claim the profits of the ship.</p> <p>20. Delivery and possession, when unnecessary; <i>hypothecation</i>; distinction between a mortgage and <i>bottomry</i>, or other maritime contract; mortgage by <i>part-owners</i>.</p> <p>31. <i>Hypothecation</i> by a master.</p> |
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1. SHIPS, like other articles of personal property, may be the subjects of mortgage; but in this, as in other respects, are to some extent governed by a peculiar set of rules and principles, which belong to the great code of *maritime law*.

2. With regard to the *form* of the mortgage of a ship, it is to be observed that the English law is not strictly applicable in this country, on account of the numerous statutory provisions, commonly called *Registry Acts*, by which the transfer of ships is regulated in Great Britain, and which, though imitated, have never been either adopted or copied in the United States.

3. By the English statutes of 4 Geo. 4, c. 41, and of 6 Geo. 4, c. 110, on the transfer of a ship or any interest therein, by mortgage or assignment in trust by way of security for a debt, the entry in the book of registry shall so state, and the mortgagee or trustee shall not by reason thereof be deemed owner, nor the mortgagor cease to be owner, except so far as to render the security available. This provision is

continued in the consolidated registry statute of 3 & 4 Wm. 4, c. 55, §§ 42, 43.¹ (a)

4. Of this statute an eminent English judge gives the following account.

5. " The statute of the 3 & 4 Wm. 4, c. 55, §§ 35, 42, 43, provides, that the bill of sale of a ship, or any share thereof, after the particulars have been entered in the Book of Registry, shall be valid and effectual to pass the property thereby intended to be transferred, against every person and to all intents and purposes, except subsequent purchasers and mortgagees, who shall first procure an indorsement to be made on the certificate, as in the act mentioned ; and further provides, that in the case of mortgages, the collector and comptroller of the port where the ship is registered, shall, in the entry of the Book of Registry, and also on the certificate of registry, express that the transfer was made only as security or by way of mortgage ; and that in such cases, and except for certain purposes, the mortgagor and not the mortgagee shall be deemed to be the owner of the ship, and that the rights of the mortgagee are not to be affected by the bankruptcy of the mortgagor, notwithstanding his reputed ownership. When the transfer is not expressed to be by way of mortgage and security, the protection, which the act intended to afford to the mortgagee against the creditors of a bankrupt ship-owner, is not obtained, and the vendee, appearing on

¹ See *Irving v Richardson*, 2 B. & Ad. 193.

(a) The conveyance of property in British ships is now almost entirely regulated by the provisions of a still later act, — the Registry Act, Stat. 8 & 9 Vict. c. 59. By section 45 of this act, when a transfer is made by way of mortgage, the nature of the transfer is to be expressed in the entry in the book, and indorsement on the certificate of registry, and the mortgagee does not become owner, except so far as may be necessary to obtain payment of the debt. *Smith's Merc. L.* 224, 228. See also 17 & 18 Vict. ch. 104 ; *Webster's Works*, vol. 3, p. 148 ; also *Shaw v. McCandless*, 36 Miss. 296 ; *Bell v. Bank*, No. 3 Hurl. & Nor. 730 ; *Dickinson v. Kitchen*, 8 Ell. & B. 789 ; *Veazie v. Somerby*, 5 Allen, 280.

the registry to be owner, may be subject to all the liabilities which belong to him in that character; but it may, I think, well be doubted, whether, under the provisions of the act, there can be any valid mortgage, in any case, in which the parties do not secure to themselves the protection which the statute gives by the mode of proceeding which is therein directed."¹

6. Upon the same subject Mr. Powell remarks: — "It was once thought there could be no valid mortgage of a ship, and it was said that no instance had occurred of a mortgage of a ship since the Registry Acts. The Vice-Chancellor, in a late case, felt surprised at this assertion: observing, that he was much struck when he heard that mortgages of ships depended merely upon honor: for that before the Registry Acts ships were mortgageable, and there was nothing in the spirit or letter of those acts to confine the transfer to an absolute sale. 1 Madd. 395."²

7. The following are the remarks of Sir T. Plumer above referred to.

8. "The mortgage should be made by the usual bill of sale of the ship, containing, in the same instrument, a defeasance or condition of re-transfer on payment of the mortgage-money. The bill of sale must contain the recital of the certificate, as the act directs, and must be fully indorsed on the certificate of registry, if the ship be in port; or if at sea, a full copy of it must be transmitted to the custom-house. The form of indorsement will be the one prescribed by the act, but with the addition of the defeasance, to express the true nature of the contract between the parties, whenever it becomes material to resort to evidence of it. There is nothing in the act to prevent such an addition being made to meet the exigency of the case. A greater deviation from the form prescribed by the act was sanctioned by the Court of Common Pleas in the case of a partial transfer of the inter-

¹ Per Lord Langdale, M. R., *Langton v. Horton*, 5 Beav. 18, 19. See *Esson v. Tarbell*, 9 Cush. 407; the *Romp*,

Olc. Adm. 196; *Myers v. Willis*, 36 Eng. L. & Eq. 850; 38 Ib. 330.
² 3 Pow. 1074.

est of a ship.¹ And an ingenious living writer (the present Lord Chief Justice of the King's Bench, in his *Treatise on Shipping*, p. 44.) has well observed, that the acts seem to require a similar deviation in the case of a mere contract for the sale of a ship, which the act directs to be registered, but which cannot be in the exact words of the form prescribed. A liberal interpretation of the act must be adopted to make form give way to substance."² (b)

9. It has been held, that a mortgage of a ship is good between the parties, though the particulars of the mortgage are not indorsed on the certificate of registry, according to 3 & 4 Wm. 4, c. 55.³

10. Chancellor Kent remarks, that no such questions as those above referred to can possibly arise under the registry acts of Congress;⁴ and that in every case of sale or transfer, there must be some instrument of writing in the nature of a bill of sale, which shall recite at length the certificate of registry, and without it the vessel is incapable of being registered anew.⁵ (c)

¹ *Underwood v. Miller*, 1 Taunt. 387.

⁴ 3 Kent, 148. See *Smith's Merc.*

² *Thompson v. Smith*, 1 Madd. Ch. L. 211, n.

395.

⁵ 3 Kent, 142.

³ *Lister v. Payn*, 11 Sim. 318.

(d) The following cases may be referred to, in which the question has been much discussed, whether the statutes of 26 & 34 Geo. 3 had not destroyed the common-law right of mortgaging a ship; and whether a transfer by indorsement on the certificate of registry did not vest an absolute title in the mortgagee. *Campbell v. Stein*, 6 Dow, P. C. 116; *Yallop*, 15 Ves. 60; *Houghton*, Ib. 251; *Dixon v. Ewart*, 3 Meri. 323. But the later decisions have settled, as stated in the text, that the registry acts relate only to transactions between vendor and vendee, and to cases of real ownership; that an equitable title in a ship may exist, by operation of law or contract of the parties; and that a mortgage is valid, according to the law as it stood before the registry acts, if those acts are complied with. *Mair v. Glennie*, 4 M. & S. 219; *Robinson v. Macdonnell*, 5 Ib. 228; *Hay v. Fairbairn*, 2 B. & Ald. 193; *Monkhouse v. Hay*, 2 Brod. & B. 114.

(e) Registration is to be governed by the laws of the United States, not of a State, or a system of town records. *Robinson v. Rice*, 3 Mich. 235.

11. It has been a matter of frequent discussion, how far the mortgagee of a ship is to be regarded as *the legal owner*, invested with the rights, and subject to the liabilities, inci-

Where a statute provided, that the mortgage of a *ship or vessel* need not be recorded with mortgages of chattels; such statute was held not applicable to a sail-boat of sixteen tons burden, kept at a hotel, and not enrolled, registered, or licensed. *Veazie v. Somerby*, 5 Allen, 280.

By Act of Congress of December 31, 1792, § 14, "when any ship or vessel, which shall have been registered pursuant to this act, or the act hereby in part repealed, shall, *in whole or in part be sold, or transferred* to a citizen or citizens of the United States, the said ship or vessel shall be registered anew, by her former name, according to the directions hereinbefore contained, (otherwise she shall cease to be deemed a ship or vessel of the United States,) and her former certificate of registry shall be delivered up to the collector, &c. And in every such case of *sale or transfer*, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite, at length, the said certificate, otherwise the said ship or vessel shall be incapable of being so registered anew," &c. Section 16 of the same act provides, "that if any ship or vessel heretofore registered, or which shall hereafter be registered, as a ship or vessel of the United States, shall be *sold or transferred, in whole or in part*, by way of trust, confidence, or *otherwise*, to a subject or citizen of any foreign prince or State, and such sale or transfer shall not be made known, in manner hereinbefore directed," she shall be forfeited.

Stat. 1803, c. 71, § 3, provides for registering, in case of sale out of the United States, when the ship returns. (See Stat. 1817, March 1.)

In South Carolina, mortgages of ships are recorded in the office of the Secretary of State. *Cape, &c. v. Conner*, 3 Rich. 335. But the purchaser of a ship, with notice of an unrecorded mortgage thereon, takes it subject to the mortgage. *Ibid*.

The following cases illustrate the points above considered.

Bill of sale of an undivided interest in a vessel, with an indorsement, that the same should be void on payment of £100 and interest. Interest was subsequently paid. The bill of sale was registered, but the registry did not notice the indorsement. The vendee having transferred his interest, the vendor files a bill against the other parties to redeem. Decree for the plaintiff, with costs, so far as they arose from the denial of his right of redemption. *Whitfield v. Parfitt*, 6 Eng. Law & Eq. 48.

Bill of sale of a vessel, the vendor remaining in possession and procuring supplies, which were charged to him. In an action by the material-men against the vendee; held, it was not competent for the defendant to show

dent to such ownership. The most common form, in which this question has arisen, has had relation to *repairs* made upon, and *supplies* furnished to, the vessel, before any actual possession on the part of the mortgagee.

12. It was remarked many years ago by the author of a valuable treatise upon this subject: "By way of advice and caution, I may with propriety say that every person, who takes a mortgage of a ship, must, until these points shall have received a more solemn determination, consider it to be possible at least that he may expose himself to a loss by the very act from which he expects a security."¹

13. Upon the same subject Chancellor Kent remarks:—"The question seems to resolve itself into the inquiry, whether the circumstances afford evidence of a contract express or implied, as regards mortgagees not in possession."² He further observes, that "if there has been no dealing with the mortgagor in the character of owner, but the credit has been given to the person who may be owner, it is a point still remaining open for discussion, whether the liability will attach to the beneficial or the legal owner."³

14. It is said by the Court in Massachusetts:⁴ "Whether the mortgagee of a ship, not in possession, can be held answerable for repairs done upon her while his title continued, seems not to be settled in England. The Common Pleas, in the case of *Jackson v. Vernon*, distinctly negative this

¹ Abbott on Shipping, 19, n.

² Kent, 135.

³ *Ibid.*

⁴ Per Parker, C. J., *Tucker v. Buffington*, 15 Mass. 479.

by parol evidence, that the bill of sale was intended for a mortgage. *Henderson v. Mayhew*, 2 Gill, 393.

On the sale of a ship there was an indorsement on her register, which was read with the vendor, "that the ship should not be sold until the notes given for the purchase-money should be paid." Held, a lien or mortgage for the purchase-money. *Welsh v. Usher*, 2 Hill, Ch. 167.

A mortgagee has the right of possession against a third person, though the mortgagor is allowed to keep the ship for sale to pay the debt. *Foster v. Perkins*, 32 Maine, 168.

responsibility; but in the King's Bench, although no contrary decision has taken place, yet a very strong opinion is expressed by Lord Kenyon in favor of such liability. And Abbott, in his Treatise on Shipping, considers the point not settled; but plainly coincides with Lord Kenyon in opinion."

15. In Maine and New Hampshire it has been decided, that the mortgagee of a vessel, who has never received a delivery nor taken possession, even though the register or enrolment is in his name, is not liable for supplies or repairs, furnished without his knowledge.¹ (*d*) So Mr. Greenleaf says:² — "The mortgagee of a ship does not incur the liabilities of an owner, until he takes possession, or actively

¹ Winslow v. Tarbox, 6 Shepl. 132.
Cutler v. Thurlo, 2 Appl. 213.

² 2 Greenl. Cruise, 110, n.; Milton v. Mosher, 7 Met. 248, 249.

(*d*) The Court in Maine give the following abstract of the decisions upon this subject. In *Chinnery v. Blackburne*, 1 H. Bl. 117, n., Lord Mansfield said: — "Till the mortgagee takes possession, the mortgagor is owner to all the world, and he is to reap the profits." And it was accordingly held, that such mortgagee was not liable for repairs in *Jackson v. Vernon*, 1 H. Bl. 114. In *Westerdell v. Dale*, 7 T. R. 306, is a dictum opposed to this opinion. In *Phillips v. Ledley*, 1 Wash. 226, Washington, J., fully sustains the cases cited from Henry Blackstone, with which he insists that of *Westerdell v. Dale* is not necessarily at variance. And although he admits, that the mortgagee of a vessel, before delivery, has the legal title, yet he decides that he is not responsible for repairs, or entitled to her earnings. In *McIntyre v. Scott*, 8 John. 159, the Court approve the decision in *Jackson v. Vernon*, and hold that a mortgagee out of possession is not liable for supplies. This last case, as well as those in Blackstone, is distinctly recognized and approved in *Thorn v. Hicks*, 7 Cow. 697. In *Winslow v. Tarbox*, 6 Shepl. 132, the mortgagor was not only in possession and use of the vessel, but the repairs were made by his consignee, at his request; and it did not appear that, at the time they were made, he was advised of any interest in the mortgagee. After the repairs had been made, the mortgagee ordered the consignee to take possession for him, cause the vessel to be enrolled in his name, sell her, if he could, and if he could not, authorize him to repair her; but the consignee failed to do any of these acts. Held, the mortgagee was not liable for the repairs.

interferes in the employment of the vessel." And to this point he cites numerous English and American authorities. So Chancellor Kent remarks, that the weight of American decisions is against the liability of a mortgagee, not in possession, for repairs.¹ And it has been recently decided in New York, that a mortgagee not in possession is not liable for supplies, though the ship be registered in his name.² The same view is taken in a recent case in Pennsylvania. Sergeant, J., remarks:—"The later decisions seem to agree that one having the legal title only, without any interference in the management of the ship, or any right to receive her freight or earnings, is not responsible; whether the title is by bill of sale or by mortgage, or other document in the nature of a pledge or security. Such persons are, it is true, in one sense, owners; that is to say, they have a valid claim or title to the property of the vessel, either in law or equity. But that is not sufficient. The owner who is responsible in such cases is the person who, having some kind of claim or title, has the control and management of the vessel, and has the right to receive her freight and earnings. And the ground of this liability seems to be the common maxim: *qui sentit commodum sentire debet et onus*; it being obviously right and just that he who enjoys the benefit of the vessel, and controls her operations, who receives her gains or has the chance of so doing, ought to pay debts incurred for the fitting out, supply, and navigation of the vessel which is to produce for him those earnings, and not a person who merely holds a right in her without the profit or use from it. It is for the former of these and not for the latter, that the master is considered as agent, and competent to bind them by his orders for supplies furnished to the vessel. The defendants had in fact no more to rely on than their mortgage, fortified by the

¹ Kent, 133. See *Fisher v. Willing* 8 S. & R. 118; *Duff v. Bayard*, 1 W. & S. 210; *Thompson v. Snow*, 4 Greenl. 264; *Leonard v. Huntington*, 15 Johns. 298; *McIntyre v. Scott*, 8, 109; *Philips v. Sedley*, 1 Wash. 226;

Ring v. Franklin, 2 Hall, 1; *Birkbeck v. Tucker*, *ib.* 121; *Lord v. Ferguson*, 9 N. H. 380.

² *Weber v. Sampson*, 6 Duer. 358. See *Rice v. Cobb*, 9 Cush. 302; *Langton v. Horton*, 5 Beav. 9.

registry in their names, which it has been frequently decided is of no avail in itself, more than any other mere title, to make them liable, as owners, to third persons; being efficacious only so far as relates to the government, or in a dispute among themselves.”¹ So in South Carolina it has been held, that the mortgagee is not liable for repairs made upon the credit of the mortgagor; the vessel being navigated for the mortgagor’s sole benefit, and under his entire control; and that the mortgagee may offer evidence of his own course of dealing to prove this, and that he was a mere agent or consignee.² So, where the owner of a vessel made a legal transfer of it to secure the defendant as an indorser for him, by surrendering the old register and taking a new one in the defendant’s name; and the vendor afterwards used and navigated the vessel for his own exclusive benefit, and during this time the plaintiff furnished supplies: held, if they were furnished on the credit of the vendor alone, the defendant was not liable, and that parol evidence was admissible to prove the transaction a mortgage, in order to explain the nature of the vendor’s possession and his sole use of the vessel.³ So, in New York, where there was a bill of sale of a ship, with a defeasance back, and the vendee took no possession, except for a few minutes by his agent; held, he was a mortgagee, and, not being in possession, was not liable for repairs.⁴

16. But if a mortgagee appears to be the absolute owner, and the repairs and supplies are made and furnished upon the credit of such ownership, he is liable.⁵ So a mortgagee, who has taken possession, and procured registration in his own name, is liable for supplies and repairs, although the creditor did not know the fact at the time the debt was incurred.⁶ So, where the plaintiff performed labor upon a vessel, and charged it to the vessel, and afterwards requested payment from the defendant, whom he considered the owner;

¹ 4 W. & S. 249, 250.

² *Cordray v. Mordecai*, 2 Rich. 518.

³ *Jones v. Blum*, 2 Rich. 475.

⁴ *Hesketh v. Stevens*, 7 Barb. 488.

⁵ *Starr v. Knox*, 2 Conn. 215.

⁶ *Miln v. Spinola*, 6 Hill, 218; 4, 177.

and the defendant wrote to the plaintiff, saying that he held the vessel as security, and it did not belong to him to pay any bills on her, but he was holden for them, and requesting the plaintiff to take an order on a third person for the amount: held, this evidence authorized a verdict for the plaintiff.¹

17. A mortgagee in possession is liable to the *master*, if the voyage is for his benefit. But where the master made a special agreement as to his wages with the mortgagor, and with full knowledge of a secret arrangement between the mortgagor and mortgagee, who had no interest in the voyage, but merely lent his name to cover it for the mortgagor's benefit, and without receiving any freight or profit; held, the master was bound by his special agreement, and could not sue the mortgagee as owner.² And mere possession of the documents does not render the mortgagee liable to the master for wages.³

18. The mortgagee of a ship cannot in his own name recover any of the earnings of the ship falling due while the mortgagor is in possession.⁴ Lord Mansfield remarks,⁵ that the action in this case must have been founded on the idea that the mortgagor in possession was the servant and agent of the mortgagee, which was not the case, for, till the mortgagee took possession, the mortgagor was owner to all the world; he bore the expenses, and he was to reap the profits. But where a ship at sea is mortgaged, and the mortgagee takes possession; the accruing freight goes to the mortgagee.⁶ And in case of a mortgage of one half of a vessel, in Maine, then of the whole to another person, who took possession under his mortgage and afterwards insured the vessel, which was lost; the wreck, &c., being abandoned, and sold by an agent of the underwriters, who paid the insurance: held,

¹ *Oakes v. Cushing*, 11 Shepl. 313.

² *Hamplin v. Butler*, 18 Johns. 169.

³ *Fisher v. Willing*, 8 S. & R. 118.

⁴ *Chinnery v. Blackburne*, 1 H. Bl. 117, n.

⁵ *Ibid.*

⁶ *Dean v. McGhie*, 4 Bing. 45.

that the first mortgagee, who had not taken possession, might recover one half of the proceeds of sale.¹ (e)

20. If a ship not in port is mortgaged, the law does not require immediate delivery; it is sufficient if possession be taken as soon as she returns.² More especially is a mortgage not fraudulent, because unaccompanied by possession, where, by agreement in the mortgage, an immediate voyage was contemplated by the owners.³

21. The mortgage of a ship on the stocks, raised and building, to be built and completed afterwards, as security for advances made and to be made, without actual possession or delivery, is not valid by way of *hypothecation* against attaching creditors.⁴ Whitman, C. J., adverts to the supposed doctrine of the civil law as to the *hypothecation* of things not in *esse*; acknowledging the value of this system of jurisprudence, as furnishing elucidation of novel or doubtful cases; and also in equity and admiralty causes; but questioning its binding authority. He also criticizes the opinion of the Court in *Macomber v. Parker*, 14 Pick. 497, and contrasts it with that in *Bonsey v. Prince*, 8 Pick. 236. He proceeds to remark as follows: "If by furnishing funds to an individual, which may always be done secretly; and, if in money, will seldom be attended with notoriety, he can be set forward

¹ *Rice v. Cobb*, Law Rep. vol. 5, No. 2, p. 111, Mass. S. J. C. 1850.

² *White v. Cole*, 24 Wend. 116. See 26 Ib. 511; *Portland, &c. v. Stubbs*, 6 Mass. 422; *Morgan v. Biddle*, 1 Yea. 3; *Clow v. Woods*, 5 S. & R. 284.

³ *Leland v. The Medora*, 2 W. & M. 92.

⁴ *Goodnow v. Dunn*, 8 Shepl. 86. Contra, *The Hull, &c. Davies*, 199.

(e) The first mortgagee sued the mortgagor upon the mortgage notes, summoning the second mortgagee as trustee. The latter had taken possession more than sixty days after breach of condition, in which time, by the law of Maine, the mortgagee's title becomes absolute, and then received from the master freight previously earned, assuming certain charges against the ship. Held, the supposed trustee was not chargeable for the insurance money, but was chargeable for the mortgagor's proportion of the net earnings in his hands, his debt having been previously *primâ facie* extinguished by taking possession under the mortgage. *Rice v. Cobb*, Law Rep. vol. 5, No. 2, p. 111, Mass. S. J. C. 1850.

upon a great scale of manufacturing, or the construction of articles attended with extensive expenditure, and thereby become ostensibly possessed of great resources, and of credit without limit; and, upon the threatening of any danger to his credit, if a secret mortgage or hypothecation, made early in the commencement of the business, of whatever shall grow out of the whole outlay, shall be allowed suddenly to spring up, and sweep the whole, it will operate as a fraud upon, perhaps, hundreds of others, who may have been induced by appearances, occasioned by the very impulse growing out of such secret loans, to expend their time, labor, and resources, in the adventure, and expose them to an utter loss of the same."¹

22. In case of reputed ownership in bankruptcy, under Stat. 21 Jac. 1, ch. 19, §§ 10, 11, the omission of mortgagees to take possession for nine months was held not to affect the title of the mortgagees, as against the assignees in bankruptcy, they having in fact taken possession before the bankruptcy of the mortgagors. The ship, under these circumstances, could not be treated as *within the order and disposition* of the mortgagors. Abbott, C. J., said:—"The bill of sale might be void upon the statute of Elizabeth, as against creditors; but not as against the parties who executed it; and the assignees are in this respect in no better situation."²

23. *Part-owners* of a ship may mortgage their shares; and the general rule, as to the necessity of delivery and possession, is somewhat modified by the peculiar relations of parties growing out of this form of title. (*f*)

24. The owner of a ship, in possession of the grand bill of

¹ *Goodnow v. Dunn*, 8 Shepl. 97.

² *Robinson v. McDonnell*, 2 B. & Ald. 134, 136.

(*f*) Where a part-owner of a vessel and cargo mortgages his share, and afterwards he and the other owners appoint an agent to sell the whole cargo; such agent, after selling the cargo and receiving the proceeds, is liable to the mortgagee, in an action for money had and received, for the mortgagor's share of the proceeds. *Milton v. Mosher*, 7 Met. 244.

sale, assigned $\frac{6}{16}$ to eight persons; and afterwards mortgaged $\frac{13}{16}$ to the defendants, being really owner of only $\frac{5}{16}$. He then sold the remaining $\frac{8}{16}$ to different persons. The plaintiff was a purchaser of $\frac{1}{8}$, and besides an assignment took formal possession of the whole ship, and got the grand bill of sale into his possession, upon which the names of himself and the seven other purchasers were indorsed, but without date. It was argued for the defendants, that if possession ought to be delivered in case of sale or mortgage of the whole ship, it is not requisite in case of a part; and that mere possession of the grand bill of sale did not give priority. Lord Camden was of opinion with the defendants, and that the plaintiff and the other seven purchasers stood in place of the original owner, and took, subject to the debts due the defendants.¹

25. The owners of one half of a vessel, the other half of which was owned by the master, some months before their bankruptcy, conveyed it by bill of sale, as collateral security for a debt, and agreed to assign all future policies of insurance thereon as further security; and that the mortgagors might use the vessel for their own benefit till default of payment. The bill of sale was not recorded. At the time of making it the vessel was at sea, in possession of the master. Between that time and the petition in bankruptcy of the mortgagors, the vessel came once to Boston, their place of business and residence, and twice to Bath, the residence and place of business of the master, but the mortgagees did not take possession. Five days before the petition, they sent notice to the master of the bill of sale, the mortgaged moiety of the vessel having been sold by order of the assignee. Held, the mortgagee was entitled to the proceeds of sale.² Upon the various points involved in the case, Story, J., remarks as follows:³ — “There can be no delivery of possession of a ship by one part-owner of his share to a purchaser, when the actual possession is in another part-owner; such, for instance, as in the present case, where the master is owner of a moiety

¹ Gillespy v. Coutts, Ambl. 652.

³ Ib. 497.

² Winsor v. McLellan, 2 Story, 492.

of the vessel, and in actual possession thereof. The most that can, under such circumstances, be required is, that the master, or other part-owners, should have notice of the transfer, so as to put them in a correct position, so far as their own rights are concerned. Their manifest object was to give collateral security to the trustees, by way of mortgage on the vessel itself, and on the policies underwritten thereon, and not merely for them to hold the bill of sale as a formal instrument by way of pledge, without giving effect to it as a conditional transfer of the property. The permission of the owners to take the profits and earnings of the vessel in the intermediate time, and until the debt was to be paid, was not inconsistent with, but in pursuance of, the original agreement. The policies were underwritten, exactly as they should be, in the name of the mortgagors, who were the general owners, subject only to the rights of the mortgagees. The subsequent change of the papers, without the consent or knowledge of the trustees, could not change their rights.”¹ “The bill of sale took effect, as a mortgage, at the time of the execution and delivery thereof to the trustees. The notice to the master was not necessary to found a title in the trustees; but it was at most only an assertion of their title, necessary to be made for the protection of the master, and for the protection of the trustees against any subsequent *bonâ fide* purchaser or judgment creditor. The notice took effect from the time when it was sent to the master; and the time, when it reached him, is not material, so far, at least, as the present assignee is concerned.”²

26. A., the owner of forty-eight shares in a ship belonging to the port of Liverpool, gave a power of attorney to B., the other part-owner, to sell his shares. The ship then sailed from Liverpool, under command of B., having on board her certificate of registry and the power of attorney. While she was at sea, A. mortgaged his shares and all future freight to the plaintiffs, who had no notice of

¹ Winsor v. McLellan, 2 Story, 499.

² *Ib.* 501.

the power of attorney, and a memorandum of the mortgage was entered in the Liverpool register. Subsequently, B. sold all the shares in the ship and cargo at Sydney (disposing of the forty-eight shares under the power) to the defendants, who had no notice of the mortgage. The ship was thereupon registered *de novo* at Sidney, and freighted by the defendants at their own expense with a new cargo for England. She sailed, and arrived in London, without going to Liverpool. The plaintiffs took possession of ship and cargo in the London docks, and gave notice at all the wharves of their claim to forty-eight shares of ship and freight. The defendants afterwards also took possession. Held, under the Registry Act, the plaintiffs' title should prevail, and they had properly taken possession.¹ Parker, V. C., says :² — "As to the title to the shares of the ship, there is no doubt the plaintiffs have made their title, as mortgagees of Ward's shares, good under sections 34 and 37 of the Registry Act. The time has not arrived for the completion of their title. By section 38 their title is good, except against such purchaser as should first procure an indorsement to be made on the certificate, as therein mentioned. The defendants represent a subsequent purchaser, who has not fulfilled that condition. The only argument for the defendants is founded on the registration *de novo* in Sydney; but that was not a registration against the mortgagor, because he was not owner." In reference to the freight, the learned Judge remarks :³ "Mortgagees of a ship who take possession before the conclusion of the voyage are entitled to the freight then accruing. A mortgagee who takes possession before the cargo is delivered comes within the rule. The right to the freight does not accrue until the goods are delivered. Parties so taking possession must be as much within the reason of the rule where the ship is in dock, as where she is only on the way to the docks. For these reasons, if the mortgagees had been mortgagees of the whole of the freight, under these circumstances,

¹ Cato v. Irving, 10 Eng. Law & Eq. 17.

² Ib. 21.

³ Ib. 22, 23.

they would have been entitled to the whole. Being mortgagees of a certain number of shares only they could not take possession, to the exclusion of Marvin or his agents. In such cases the mortgagee, without formally taking possession, if he gives notice and requires payment to himself of his shares, that entitles him to receive his shares of the freight then accruing, and not actually due. To hold otherwise would render it impossible for the mortgagee to make a title to his shares at all."

27. The exceptions in 2 N. Y. Rev. Stats. 70, § 7, referring to loans made upon vessels in reference to voyages, are of a nautical character, and do not apply to mortgages of personal property in their ordinary sense.¹ In a learned and elaborate opinion upon this subject, Mr. Justice Cowen remarks as follows: — "Every statute made to suppress fraud should be construed liberally for the promotion of that end. The principle of the exception should be regarded. The fact of the vessel not being in port, excused the immediate delivery; but giving to that fact the same operation after the vessel was perfectly within the control of the mortgagees, would be straining a point in favor of parties engaged in using the very means which the statute had regarded as strong proof of fraud being intended."² He proceeds further to say: "Bottomry is in the nature of a mortgage of a ship. It is when the owner takes up money to carry on his voyage, and pledges the keel or bottom of the ship as security for the repayment. If the ship be lost, the lender loses also his whole money; but if it return in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. This definition contemplates taking up money, on some specific voyage or adventure which may be at more than 7 per cent. interest, because the loan is gone if the vessel be lost. It is a contract of hazard. No transaction or stipulation of that kind appears between the Demings and their mortgagees.

¹ *White v. Cole*, 24 Wend. 116; 26 Ib. 511.

² *Ib.* 122.

The security was given for a precedent debt, and the contract would have been vitiated by an usurious rate of interest.”¹ In bottomry, “if the risk be not incurred, no contract arises. It is a gaming contract. It loses its character entirely when the money secured by bottomry was originally advanced on the personal credit of the owner; and the bottomry bond, or rather what professes to be such, is afterwards taken. The contract is entirely of a nautical character. In the case at bar, the security was taken for a precedent debt between landsmen, in respect to a land transaction. The reason of the contract is limited to voyages on the ocean or its great navigable arms, in the prosecution of which the merchant often incurs extraordinary risks. The nature and object of the transaction implies that the pledgor should keep possession. His possession is an element without which the contract loses its distinctive character.”² The learned Judge proceeds further to show, that the transaction in question is neither a case of *respondentia* nor *hypothecation* of a vessel in a foreign port.

28. Sale of one half of a brig, the buyer giving notes for part of the price, with a bond, which recited that said sum was to run on bottomry on said half, and conditioned to pay the notes at maturity, and that the buyer should keep half the brig insured, and that upon failure to pay the notes the vendor might sell the half at auction, for payment of the notes and expenses, accounting to the purchaser for any surplus. By the same instrument, the buyer made the seller his attorney, to convey the property at such sale. Held, the transaction did not give the vendor an equitable lien, nor declare a trust, which was valid as against a purchaser from the vendee, even with notice. The instrument was not a bottomry bond, though plainly so intended. No marine interest was reserved. The vessel was not put at risk, nor did the security of the debt depend upon its safety alone. The instrument was merely an agreement, that the vendor

¹ *White v. Cole*, 24 Wend. 126, 127, 128.

² *Ib.* 129.

of property might resell it upon non-payment of the price, and pay himself from the proceeds, without words of grant, conveyance, pledge, or hypothecation. It was not a valid mortgage, pledge, or hypothecation, for want of possession or registration, nor was it a power coupled with an interest, and amounting to an assignment. There could be no proceeds till a sale, and the vendor had an interest in the proceeds alone when realized. Hence he took only a naked, revocable power *inter vivos*. As a declaration of trust, the agreement might be binding between the parties, but not as to third persons.¹

29. A bottomry bond, unaccompanied by delivery, cannot constitute a mortgage, unless recorded according to Stat. (Maine,) 1849, ch. 390.² (g)

30. The charterer of a ship in a foreign port, who had notice of a prior mortgage on the ship and its future earnings, agreed with the master, who was also owner, to advance on bottomry such sum as should be necessary to equip

¹ Webb v. Walker, 7 Cush. 46, 49, 50, 51; acc. Hunt v. Rousmanier, 2 Mas. 342; 3 Ib. 294; 8 Wheat. 174.

² Greeley v. Waterhouse, 1 Appl. 9.

(g) Though a part of the consideration of a mortgage was money actually advanced for the voyage, the obligation for it on a mortgage is still good, however it might be in case of a bottomry bond. Leland v. The Medora, 2 W. & M. 92.

Woodbury, J., says: — "It may be good as a mere mortgage, but in that event it has no superiority or privileges over other mortgages, unless, as hereafter examined, it has some claims for higher respect in admiralty courts, by being a mortgage of a ship, and for a debt connected with maritime business. It is, then, in this case, a mere mortgage of a chattel. It is, then, of course, to be governed by all the rules, and the law in respect to other mortgages of such chattels, and the rights under it are to be settled at common law, unless the subject-matter being a vessel, or the consideration being maritime, the Courts of Admiralty can get jurisdiction on that account. In England it seems to be well settled, that her Courts of Admiralty have no jurisdiction over the mortgage of a vessel, merely because the subject-matter is a vessel. Admiralty never decides on questions of property, as between mortgagee and owner." Ib. 108, 109.

the ship for the homeward voyage. A bottomry bond was accordingly executed, but the amount of the necessary expenses of outfit proved to exceed the bond. Held, as against the mortgagee, he could not set off the excess against the sum which became due under the charter party.¹

31. The master, when abroad, and in the absence of the owner, may *hypothecate* the ship, freight, and cargo, to raise money requisite for completion of the voyage. The right exists only in cases of necessity, and when he cannot otherwise procure the money, and has no funds of the owner or of his own, which he can command and apply to the purpose.² And the master of a ship has no authority to hypothecate her for money advanced for repairs, unless repayment is conditioned upon the arrival of the ship. Nor can he pledge the ship itself and the personal credit of the owners.³ So the master of a ship, having borrowed money for repairs, gave the lender bills on the owner, and on the consignee of the cargo, for the amount, and also an instrument, purporting to hypothecate the vessel, &c.; and stipulating that, in case of non-acceptance or non-payment, the lenders might take possession and sell, under admiralty process; that they should forbear maritime interest, and might recover the advances, whether the vessel had arrived at her port of destination or not. Held, the instrument was void.⁴

¹ Dobson v. Lyall, 2 Phill. 325.

² 3 Kent, 171.

³ Stainbank v. Fenning, 6 Eng. Law & Eq. 412.

⁴ Ibid.

CHAPTER XLII.

DESCRIPTION OF THE PROPERTY MORTGAGED. WHAT THINGS WILL PASS UNDER A GENERAL DESCRIPTION. PROPERTY SUBSEQUENTLY ACQUIRED. PAROL EVIDENCE TO EXPLAIN THE MORTGAGE.

1. General description ; what things will pass thereby ; evidence as to place and identity ; effect of a *schedule*.

4. Mortgage of property subsequently acquired. Rule in England and in the several United States.

24. Title by *accession*.

25. Title by *confusion* or intermixture.

26. *Issue* or offspring ; whether subject to the mortgage security.

1. ANOTHER point of frequent occurrence relates to *the terms of description* of the property mortgaged. The question may arise, whether such description is sufficiently definite to apply to any, or, if any, to what, particular articles ; and also whether a mortgage can pass a title to property not belonging to the mortgagor at the time, but *subsequently acquired* by him, even though the terms of the instrument are sufficient to cover it.

2. It is said, "the articles mortgaged must be of such a nature and so situated as to be capable of being specifically designated and identified by written description."¹ But that any description, which will enable third persons to identify the property, aided by inquiries which the mortgage itself indicates and directs, is sufficient. As for example : "The following property now situated in W. and M.'s B. Factory, so called, on S. Street, near F., Cincinnati, viz : three twelve-feet planing machines, Nos. 3, 4, and 5," . . . "now in my shop in said W. and M.'s,"² &c. So, as between the parties, a specific and particular description of the

¹ *Bullock v. Williams*, 16 Pick. 33.

² *Lawrence v. Evarts*, 7 Ohio, (N. S.) 194.

several articles, by which to identify them from other like articles of the mortgagor, in the same building, is not necessary. And a mortgage of a specific number of articles, of a particular kind, in a house in which are other like articles of the mortgagor, gives to the mortgagee the right of selection.¹ So a mortgage, of "all and singular the stock, tools, and chattels belonging to" the mortgagor "in and about the wheelwright's shop occupied by" him, is not void as against his creditors; and, if they attach the property, the mortgagee may demand payment of the officer, under the statute, and in an action against him may show, by parol evidence, what articles were in and about the shop when the mortgage was made.² So, where a mortgage described among other property "one four-horse post-coach called Steuben, and another called Mayday, and all at Hornellsville, employed in staging;" parol evidence was admitted to show that there was no coach called "Steuben" at Hornellsville, or employed in staging there, and that the coach called "Couhocton" was included in the mortgage, the mortgagor having only two four-horse post-coaches, the "Mayday" and the "Couhocton."³ So by a mortgage of "the following personal property, to wit, one bay mare; one cow; one chaise and harness; one sleigh, robes, and harness; one saddle and bridle; all the farming tools and other personal property in and about the barn and premises at Herbert Hall; all the furniture and all other articles of personal property in and about Herbert Hall, so called;" a family carriage belonging to the mortgagor passes, if on the premises known as Herbert Hall at the time the mortgage is given; and evidence that the mortgagor, immediately afterwards, went upon the premises with the mortgagee and pointed out this carriage to him as included in the mortgage, is competent evidence to identify it.⁴ So a boat in the water near a hotel passes under a general description of property *in and about* the hotel,

¹ Call v. Gray, 37 N. H. 428.

³ Dodge v. Potter, 18 Barb. 193.

² Harding v. Coburn, 12 Met. 333;
Lawrence v. Evarts, 7 Ohio (N. S.)

⁴ Goulding v. Swett, 13 Gray, 517.

though other boats are specified.¹ So under the general terms of *office furniture*, though other articles are enumerated, a *safe* passes.² So when a mortgage mentions a specific number of articles of a certain kind, in and about a shop, and also all the other personal property there situate, the specific enumeration does not prevent the passing of other articles of the same kind, which are in and about the shop.³ (a) So where there was a mortgage of all the property "now in the shop occupied by me in said," &c.; and the mortgage bore no date, but was duly recorded: held, parol evidence was admissible to explain it, and it was a valid security.⁴ So a mortgage of "said store," (standing on the land of another person,) "and all the goods, wares, and merchandise in and about the same," is a valid mortgage.⁵ So a mortgage of all the goods in a store remains valid after a removal of the goods.⁶ So a mortgage of personal property described it as "all the staves I have in Monterey, the same I had of Moses Fargo." The mortgagor had no staves in Monterey, but he did purchase a quantity of Fargo, and at the time of the mortgage they were in Sandisfield, near the line of Monterey. Held, if the property could be identified, the description was sufficient to hold it.⁷ So there was a mortgage of "one ton of wire," among other articles. The mortgagor afterwards sold all his wire, amounting to 2,662 pounds. In an action of trover by the mortgagee against the purchaser, held, the plaintiff might prove facts and cir-

¹ *Venzie v. Somerby*, (Mass.) Law Reg. Nov. 1863, p. 64.

² *Skowhegan, &c. v. Farrar*, 46 Maine, 293.

³ *Harding v. Colburn*, 12 Met. 333.

⁴ *Burditt v. Hunt*, 25 Maine, 419.

⁵ *Wolfe v. Dorr*, 11 Shepl. 104.

⁶ *Wheelden v. Wilson*, 44 Maine, 1.

⁷ *Pettis v. Kellogg*, S. J. C. Mass. Sept. 1851, Law Rep. Oct. 1851, p. 327; 7 Cush. 456.

(a) Mortgage of "all the pine timber in Whitman's mill-yard and pond, and all the manufactured lumber in and about said mill." There was a lane leading from the mill-yard to the main road, and some of the lumber lay on the west side of the road and nearly opposite the west end of the lane. It was doubted, whether that lumber were included by the words "about said mill." *Morse v. Pike*, 15 N. H. 529.

cumstances tending to show that the parties to the mortgage did not intend a precise ton by weight, but a certain mass of wire, stored in a certain place, and called a ton; and that upon such evidence the Jury might find that all the wire in that place was mortgaged, and give damages for the conversion of 2,662 pounds.¹ Dewey, J., says:² — “Resort must be had to parol evidence to identify the wire; the description being loose, giving no location or specification, distinguishing it from any other brass wire. Had it appeared that the mortgagor owned a large quantity of such wire lying in one parcel, and very considerably exceeding the amount of one ton, the case would be different. The description of the article in the mortgage would clearly indicate that the mortgagor could not have intended to transfer several tons of brass wire, and no parol evidence would be admissible to explain or control it.” So a mortgage of all the goods, &c., in and about a certain building, with a provision that a schedule shall be annexed, is valid as to all the articles which can be identified, though no schedule is ever annexed.³ “The reference to a schedule to be annexed was not to limit or restrain the generality of the previous description of the property, but it was to be inserted for greater certainty and exactness, and the better to enable the mortgagee to identify the articles. It was not, therefore, essential to the validity of the mortgage.”⁴ So where a lessee, by a clause in the lease, mortgaged all his chattels on the demised premises, “an inventory whereof is to be made and annexed” as security for the rent; but no inventory was annexed: held, a mortgage of all the property on the premises at the time of the demise.⁵ So where there was a mortgage of “the following goods and chattels;” and then followed a list of articles on a separate piece of paper, attached to the deed by a wafer: held, the mortgage contained a description of the property; and, in the absence of evi-

¹ *Barry v. Bennett*, 7 Met. 354.

⁴ Per Shaw, C. J., *Ib.* 316.

² *Ib.* 362.

⁵ *Van Heusen v. Radcliff*, 17 N. Y.

³ *Winslow v. Merchants', &c.*, 4 Met. (3 Smith,) 580.

dence to the contrary, it was to be presumed that the paper was annexed before execution of the deed.¹ Gilchrist, J., says:² — “This schedule is not an alteration of the deed. It is something, without which the deed would be insensible. It is not an erasure, nor an interlineation; nor is there anything in it which raises a suspicion of fraud. There is nothing requiring us to make a presumption against it; but, in the absence of evidence, the presumptions are all in its favor. It might have been annexed to the deed after its execution, but there is no reason for supposing it.” So where ashes in an ashery were among the articles enumerated in an instrument, by which one party agreed to sell, and the other to buy certain personal property, at a certain price, but the quantity was not specified, but was described as the ashes then being in the ashery in the possession of the purchaser, and it did not appear that the seller had any other than the ashes in question, or that there was more than one ashery in possession of the purchaser; held, this was sufficient notice within the Registry Act of the property intended; that the mortgage was not void for uncertainty, but parol evidence might be given of the quantity intended.³

3. But, on the other hand, where a mortgage of household furniture purported to convey a specified number of different kinds of furniture, not otherwise described than by a general designation, and as contained in the hotel of the mortgagor, there being at the time a greater number of some of the articles and a less number of others, owned by the mortgagor, and contained in his hotel; held, the mortgage was good as to those articles that were less in number than those described in the mortgage, and, as to the others, it was void for uncertainty.⁴ So, under the Canadian statute, (20 Vict. c. 3, § 4,) which requires that a mortgage of chattels “shall contain such efficient and full description thereof that the

¹ *Bolknapp v. Wendell*, 1 Fost. 175.
² *Id.* 184.

³ *Dunning v. Stearns*, 9 Barb. 630.

⁴ *Croswell v. Allis*, 25 Conn. 301.

same may be thereby readily and easily known and distinguished," a mortgage of a horse, describing it simply as "one sorrel horse," is void, as to others than the parties to it, and for want of sufficient description.¹ And a mortgage of "all the stock in trade, of any nature," &c., does not pass notes and claims of a firm.² So, under a chattel mortgage of "all of the goods of different kinds and varieties in the store of," &c., an iron safe, not for sale, but for private use, is not included.³

4. With reference to the mortgage of *future property*, it is laid down as the general rule in England, that an assignment will not *at law* pass chattels *not in existence*, or *not in the ownership* of the grantor, or not sufficiently appropriated at the time of the assignment, although such an assignment may have effect by a subsequent act of the grantor, in furtherance of the original disposition. And accordingly a bill of sale of the furniture and effects in a certain house will only pass such things as are in the house at the time of the grant, though effects to be subsequently brought on the premises are expressly included. But the instrument might, it seems, be so framed as to give the mortgagee a power of seizing such future chattels of the grantor, as they should be acquired by him and brought upon the premises; and such future chattels will pass where there is already a foundation of an interest in the grantor.⁴ And a distinction is sometimes suggested in reference to property of a fluctuating and consumable nature, as wines, provisions, &c., in which case a mortgage of the premises and stock in trade is said to pass subsequently acquired articles.⁵ (b)

¹ *Montgomery v. Wight*, 8 Mich. 143.

Warner, 2 Har. & G. 415; *Floyd v. Morrow*, 26 Ala. 353.

² *Kemp v. Carley*, 3 Duer, 1.

⁵ *Tapfield v. Hillman*, 7 Jur. 771; 12

³ *Curtis v. Phillips*, 5 Mich. 112.

L. J. (N. S.) 311.

⁴ *Coote*, 283, 284. See *Hudson v.*

(b) Mortgage by an innkeeper of his stock in trade, chaises, horses, &c. After the mortgage, he continued the business on the premises for three years, constantly renewing his stock. Held, the mortgage, without special

5. The doctrine upon this subject in the United States has been somewhat various.

6. It is held in Massachusetts, that a mortgage of goods not belonging to the mortgagor at the time, but subsequently acquired, is void against his attaching creditors. In such case, evidence is irrelevant and incompetent that the mortgagee took possession for the purpose of foreclosure.¹

¹ *Jones v. Richardson*, 10 Met. 481.

words to that effect, did not pass the after-acquired property. *Tapfield v. Hillman*, 7 Jur. 771; 12 L. J. (N. S.) 311.

An agreement was made between principal and factor, that, in consideration of the acceptance by the latter of a bill drawn on him by the former, the boat-masters of two boats belonging to the principal should hold the cargoes for the factor as his security, which was assented to by the masters, and their receipts transmitted by the principal to the factor, who duly accepted the bills. At the time of the receipt given by the masters, one of the boats was not loaded, though the principal had the cargo ready. Before the shipment on board that boat was completed, the principal made another agreement with another creditor concerning the cargo of that boat, and a new receipt was given to such creditor of the cargo then on board when it was fully shipped. Held, there was no appropriation of that cargo to the factor, though the master might have required the principal to put merchandise on board to the amount of the first bill of lading on account of the factor. *Bryans v. Nix*, 4 Mees. & W. 775.

In a late case, a mortgage is held to pass property substituted for that originally transferred after possession taken by the mortgagee. *Hope v. Hayley*, 34 Eng. L. & Eq. 189.

When, on the face of an assignment of personalty, it is plain that it was intended to operate as a continuing security, and to apply to property afterwards acquired, and substituted for that which was originally assigned; it will, if the words are capable of such a construction, be so applied. *Carr v. Allatt*, 3 Hurl. & Nor. 964.

And where in such a case the deed was found capable of such a construction, although rather in the indirect form of a power of attorney than in the way of direct conveyance, it was construed to extend to stock and growing crops on a farm not occupied by the assignor at the time of the execution of the deed. *Ib.*

A, in consideration of a debt, granted to B., for securing that or any future debts, "all the fixtures and fittings, household furniture, stock-in-trade, in and about the premises of A., and which were more particularly men-

7. In a later case in the same State it is held, that one cannot grant or mortgage property of which he is not possessed, and to which he has no title at the time. The following distinctions are laid down by the Court. A *potential* possession may be sufficient; as where one grants all the wool that shall grow on the sheep he owns at the time of the grant. (c) But not wool which shall grow on sheep not his, but which he may afterwards buy. And these principles are equally applicable in courts of law and of equity. There are equitable liens, recognized in equity, though not at law. As where one agrees to convey property, or do some act, and the performance is casually postponed; in which case, equity will consider a thing done which was agreed to be done. But there the property is in existence at the time, and the party has then the power to convey or stipulate for a conveyance.¹ (d)

¹ Moody v. Wright, 13 Met. 29, 30.

tioned in the schedule thereto, and all the right and interest of A. thereto"; and empowered B., his executors, &c., to enter upon the said premises of A., whether acquired subsequently to the date of the deed, and not legally passing under it, or previously thereto, which before the satisfaction of that security should at any time be upon the said premises, in the name or names of A., his executors or administrators, or otherwise, to make and perfect any assignment, transfer a delivery thereof to any agent or trustee for B., his executors, &c., or to a purchaser or otherwise. Held, B. was justified in seizing after-acquired property of A. upon premises built subsequently to the date of the instrument. Chidell v. Galsworthy, 6 C. B. (N. S.) 471.

(c) Bill to attach the interest of a party in a contract, by which he was to feed thirty head of cattle for a year, and at the end of the time to have one half of the cattle for his trouble. He had previously made a mortgage of his interest in this contract. Held, the contract was executory only, and did not vest a title subject to execution; but, if it were thus subject, the mortgagee's prior title should prevail. Forman v. Proctor, 9 B. Mon. 124. See Pooley v. Budd, 7 Eng. L. & Eq. 229.

(d) The Court proceed to cite the following cases as illustrating the distinctions above referred to. In the case of Langton v. Horton,* (1 Hare,

* In this case Wigram, V. C., says, (1 Hare, 555, 556, 557,) "I lay out of view all question as to the operation of the instrument at law, and look at the case only as a

8. Mortgage of a building, "and also such tools and other property as is now contemplated to be placed in said building." with a covenant that the instrument shall create a lien on the property. Held, it was not to create such lien upon property afterwards placed in the building, but to be void

549.) there was a contract between the parties, which in equity would have given the plaintiff a title to the cargo when it arrived, and the contract having been perfected by possession lawfully taken, it being a case of property mortgaged while at sea, and it being sufficient to take possession forthwith on its arrival, the plaintiffs were held entitled to hold under this contract, as against a judgment creditor. In *Mogg v. Baker*, 3 Mees. & W. 195, it was held, that an agreement to mortgage certain specified furniture, then in existence, would constitute an equitable title in the party holding such agreement, and prevent its passing to the assignees in insolvency of the proposed mortgagor: but if it was only an agreement to mortgage furniture to be subsequently acquired, then it would confer no right in equity. The same doctrine was affirmed in the case of *Gale v. Burnell*, 7 Ad. & Ell. N. R. 850.

question in equity. For some purposes, at least, by contract, an interest in a thing not in existence at the time of the contract may, in equity, become the property of a purchaser for value. A tenant, for example, contracts that particular things, which shall be on the property when the term of his occupation expires, shall be the property of the lessor at a certain price, or at a price to be determined in a certain manner. This, in fact, is a contract to sell property not then belonging to the vendor, and a court of equity will enforce such contracts, where they are founded on valuable consideration, and justice requires that the contract should be specifically performed. The same doctrine is applied in important cases of contracts relating to mines, where the lessee has agreed to leave engines and machinery not annexed to the freehold which shall be on the property at the expiration of the lease, to be paid for at a valuation. The contract applies, in terms, to implements which shall be there at the time specified: and here neither construction nor decision has confined it to those articles which were on the property at the time the lease was granted. Suppose the case of the owner of a ship, which is going out in ballast, proposing to borrow of another party a sum of £5,000 to pay the crew and furnish an outfit; and agreeing that, in consideration of the loan, the homeward cargo should be consigned to the party advancing the money. A court of equity, upon a contract so framed, would hold that the party advancing the money was, as against the owner, entitled to claim the homeward cargo. And if a party may contract for the consignment of a homeward cargo, I cannot see why he may not contract with the owner of a ship engaged in the South Sea fisheries, that the fruit of the voyage, the whales taken, or the oil obtained, shall be his security for the amount of his advances." "The parties could do nothing more in this country with reference to the cargo, than execute an instrument purporting to assign such interest as Birnie had, send a notice of the assignment to the master of the ship, and await the arrival of the ship and cargo." See *Congreve v. Evetts*, 10 L. J. 265.

for uncertainty, as against a mortgage made after this addition; more especially, as at the time of executing the instrument the building had not been erected, no machinery or tools placed in it, and a considerable part of the articles claimed were manufactured afterwards.¹

9. Sale of personal property, as stock for a tannery, the purchaser giving his note for the price, payable in four months, with interest annually, secured by a mortgage, duly recorded, of this and other property, and also of whatever stock, of every description, that might thereafter belong to him, wherever situated, and whether manufactured or not, or the proceeds of the same, if sold, and all leather that might thereafter be manufactured from the proceeds of property then on hand, and in whatever shape it might thereafter exist, so that the then existing and the future property and earnings of his tan-works might stand conveyed, pledged, and hypothecated to the vendor. The vendor did no act to obtain possession of that portion of the property which was not in existence at the making of the mortgage, but afterwards came into the hands of the vendee; and the latter filed a petition, and his estate was duly assigned, under the insolvent law of the Commonwealth. Upon a petition for a sale of this part of the property, under sect. 3 of the Insolvent Act of 1838, held, the mortgagee had no legal or equitable lien upon it, and the petition was dismissed.² In giving the opinion of the Court, Dewey, J., says: ³—“The petitioner cannot hold the property in controversy as mortgaged property, because it was not in existence, and therefore not capable of being conveyed in mortgage, at the time when the mortgage was made. The instrument could not operate to pass the property as a pledge, because the custody of the same was not taken and retained by the pledgee. The property cannot be held as charged with a lien, because a lien cannot be created by an executory agreement, without being accompanied by possession or delivery of the property.” To

¹ Winslow v. Merchants', &c., 4 Met. 306.

² Moody v. Wright, 13 Met. 17.

³ *Ib.* 32, 33.

the last proposition, however, he adds the qualification, that a creditor, with whom such an agreement is made to secure his claim, may take the property into his possession when it comes into existence, and thus perfect his security, provided no other person has acquired a prior title by legal process or transfer of the debtor.

10. Mortgage of all the goods, &c., then in the mortgagor's store, and all which might be substituted for them, provided that, until default, he might use and sell the mortgaged property, other goods, &c., of equal value being substituted. Held inapplicable to goods not in existence or not capable of being identified at the time it was made, or to goods intended to be afterwards purchased to replace those which should be sold.¹ (*e*)

11. A stipulation in a mortgage, that property subsequently purchased by the mortgagor shall be subject to the same lien, and that the mortgagor will execute a new mortgage thereof, is an executory agreement, which, until such new mortgage is made, does not bind after-acquired property. But the mortgage is still valid as to property owned by the mortgagor at the time of its execution.²

11 *a*. Where a first mortgage was obviously, from its terms, intended to pass future property, and a second mortgage conveyed all the property *referred to* in the first; the second was held to pass all acquired between the two mortgages.³

12. In New York, it is said, if a mortgage of future property is valid in equity, it is only as a contract to assign when the property shall be acquired. And if enforced in equity, it can only be as a right under the contract, not as a trust at-

¹ *Barnard v. Eaton*, 2 Cush. 294.

³ *Henshaw v. Bank, &c.*, 10 Gray,

² *Codman v. Freeman*, 3 Cush. 306. 568.

(*e*) A mortgage in the terms above stated does not authorize the mortgagor to put the property into a partnership, as his share of the capital. 2 Cush. 294. Where a mortgage of future property was made by a railroad corporation, and ratified by the legislature, it was held valid. *Howe v. Freeman*, 11 Gray, 566.

tached to the property.¹ So, where money was advanced to a merchant, to sustain him in his business ; to secure which, together with debts previously due, he gave a mortgage of all the goods and stock in trade which he then had, or might have at any time before payment of the whole debt ; and he was permitted to remain in possession : held, the mortgage was valid as to the goods in the store at the time, and those purchased with their proceeds, but no further.² So, where there was a mortgage of the scythes, iron, steel, and coal then owned by the mortgagors, “and all scythes, iron, steel and coal which may be purchased in lieu of the aforesaid property ;” held, as to the subsequently-acquired property, void for uncertainty, as an actual conveyance, though it might operate as a contract for a future mortgage ; and that such property might be sold on execution against the mortgagor.³ So an arrangement between a mortgagor and mortgagee of personal property, that the mortgagor may continue to sell portions of it and supply its place by other property of the same kind, and that the mortgage shall attach to the property on hand at the time of the condition broken, is void.⁴ So a mortgage of future crops is held void.⁵ But the circumstance, that a man attempts to mortgage property which he does not possess, does not affect the validity of the mortgage as regards property which he actually possesses. And the question of fraud in such cases is for the jury, and cannot be examined into by the Court.⁶

13. In Illinois it has been held, that, where property mortgaged is subsequently exchanged for other property, with the mortgagee's consent, the latter is not bound by the mortgage.⁷ Purple, J., says :⁸ — “ By his (the mortgagor's) consent, he (the mortgagee) might dispose of any portion of the mortgaged property, or the mortgagor might do the same with his (the mortgagee's) permission. But that the thing taken

¹ *Otis v. Sill*, 8 Barb. 102. See *Shuart v. Taylor*, 7 How. Pr. 251.

² *Levy v. Welsh*, 2 Edw. Ch. 438.

³ *Otis v. Sill*, 8 Barb. 102.

⁴ *Gardner v. McEwen*, 19 N. Y. (5 Smith) 123.

⁵ *Milliman v. Neher*, 20 Barb. 37 ; acc. *Comstock v. Scales*, 7 Wis. 159.

⁶ *Gardner v. McEwen*, 19 N. Y. (5 Smith) 123.

⁷ *Rhines v. Phelps*, 3 Gilman. 455.

⁸ *Ib.* 463.

in exchange for the mortgaged property can, by the verbal agreement of the parties, become substituted for, and stand in the place of, that which had been included in the mortgage, is an absurdity. The elementary principle of the law, which prohibits any and every contract from being partly in writing under seal, and partly in parol, forbids it." So a chattel-mortgage, which authorizes the mortgagor to retain possession of the property, to use and enjoy the same, according to the usual course of retail trade, is not good; but if it authorizes possession of the goods to be taken, and possession is taken under the power, the possession so taken is not vitiated because of the vicious provision in the mortgage. And the fact, that the mortgagors were continued in the store, under their old sign, and sold goods for the benefit of the mortgagees, will not destroy the apparent good faith of the transaction.¹

14. It has been held in Maine, that a mortgage lien will cover goods, purchased after the execution of the mortgage, with the proceeds of the sale of those actually mortgaged. So in case of goods exchanged for those included in the mortgage, if the mortgagee ratify such exchange.² The Court say: — "The proceeds were purchased with their property, through his agency, under their authority. They represented the goods, were substituted for them, and by the contract were equally subject to their control. It was manifestly the intention of the parties, that the proceeds should be subject to their lien. If he sold for cash, the money was theirs, so long as it could be identified. And if with the money received he purchased other property, the property so purchased was theirs, until he extinguished their right, by fulfilling the condition. So if he exchanged the goods mortgaged for other goods, and they chose to ratify it, the goods received in exchange were equally subject to their lien. This course of proceeding was not calculated to injure other creditors. The debtor's right to redeem was all which could be made

¹ Read v. Wilson, 22 Ill. 377.

² Abbott v. Goodwin, 7 Shepl. 403.

available for their benefit, under the statute of 1835, ch. 188. And the remedy there provided would apply as well to the substituted goods, as to those originally mortgaged. Nor would the mortgagor obtain credit by the possession of the one any more than by the possession of the other.”¹

15. But where a mortgage of stock provided, that all additions subsequently made should be held in the same manner as the goods then in store; held, this clause could have no effect to vest such additions in the mortgagee without some further act by the mortgagor.²

16. In a very late case, in the same State, a railroad corporation mortgaged in trust their road and franchise, with all engines and cars then owned, or afterwards to be bought and put on the road. Held, the property subsequently bought passed by the mortgage. In this case, the general maxim was recognized, “*Qui non habet, ille non dat.*” It was questioned, whether upon this subject the rules of equity and law differ. The test of validity was laid down, that the property must be described, and reasonably certain to exist; and the mortgagor must have a present, actual interest in or concerning it. In reference to the particular articles mortgaged in this case, the important fact was relied upon, that they were fitted to the gauge of the road, and adapted to the particular use upon it. And it was held doubtful whether they could be validly mortgaged without the road itself.³

17. In New Hampshire, where a debtor mortgaged a number of unfinished pruning shears, and the mortgagor afterwards finished the shears, and thereby greatly added to their value; held, in the absence of fraud, this alteration would not invalidate the mortgage, as against an attaching creditor.⁴

18. In the same State, a mortgage was given, dated January, 1859, of “all the hay and grain, of every kind, that

¹ Per Weston, C. J., 7 Shepl. 411, 412.

² Chapin v. Cram, 40 Maine, 561.

³ Morrill v. Noyes, (Maine) Law Reg. Nov. 1863, p. 18. See Holroyd v.

Marshall, 9 Jur. N. S. 213, (House of Lords); Abbott v. Stratton, 3 J. & Latt. 603.

⁴ Perry v. Pettingill, 33 N. H. 433.

grows on the farm on which I now live, the present year." In an action by the mortgagee against an officer for taking hay, grain, and straw, the product of this farm during the year 1859, it appeared that the rye and rye-straw were from the sowing of the fall of 1858, and that the defendant attached the property October 20, 1859, while in the barn of the mortgagor. Held, the plaintiff should recover for the hay and winter-rye, which were *in esse* at the time of execution of the mortgage, but not for the grain crop of the spring of 1859.¹

19. In Connecticut, if the mortgagor of personal property, belonging to a business establishment, sell the articles mortgaged, and with the proceeds purchase others; the mortgagee does not gain a title to the newly-acquired property by mere operation of law. But if the new articles are purchased merely to replenish the establishment, by supplying the place of lost or worn-out articles belonging to it, and they become attached to and incorporated with it; they follow its title by right of accession.² Strong, J., says: ³ — "They would form an incident to, and follow the title of, the printing establishment, to which they were attached, which would be the principal thing; as if the borrower of a watch should replace its crystal, or of a musical instrument, one of its strings, keys, or pipes, which had been lost, destroyed, or become useless while in his service; in which cases they would belong to the lender."

20. When unfinished articles of manufacture are mortgaged, to which the mortgagor subsequently adds labor and material the mortgagee will hold them, as against a creditor of the mortgagor, if they remain substantially the same as when mortgaged. But a doubt was expressed whether it would be so, if they are substantially changed, or their value greatly increased by such addition.⁴

21. In Michigan, where goods mortgaged were left in the hands of the mortgagor, with power to sell and dispose of the

¹ *Cudworth v. Scott*, 11 N. H. 476.

² *Hoby v. Brown*, 14 Conn. 255.

³ *Ib.* 266. See ch. 40.

⁴ *Harding v. Colburn*, 12 Met. 333.

same in the usual course of business, and the mortgagor applied the proceeds of sales in the purchase of other goods to keep up the stock, in the support of himself, and in paying debts other than that secured by the mortgage, the mortgagee not interfering; held, such mortgage should not necessarily be held absolutely void as against creditors of the mortgagor, it appearing to be valid on its face, and made without any actual fraudulent intent.¹

22. In Maryland, a mortgagee of a stock of goods in a store, together with "other property and effects which may hereafter be brought into said building by the mortgagor, or may be substituted by him in lieu of that hereby mortgaged," has no lien upon, or interest in, such goods as have been subsequently purchased out of the proceeds of those mortgaged.² So A. mortgaged to B. all the stock and goods, in certain stores in Baltimore, "together with all renewals of, and substitutions for, the same, or any part or parts thereof." Held, that such a mortgage does not convey to the mortgagee such property in subsequently-acquired goods, as enables him to bring an action at law against a party who seizes them. A mortgagee of property so mortgaged is bound to prove in such action that the property taken was in the stores at the time the mortgage was executed; that the defendant then knew it was there, or that it was pointed out as such by him, the mortgagee, to the officer.³

23. In Ohio, the plaintiff advanced money to B., to enable him to pay for a stock of goods; taking a mortgage upon the goods with their future increase and additions, which also contained a clause authorizing him to take possession of that stock, and all that B. might thereafter have. Upon demand of payment, B. delivered the stock to the plaintiff, and with it a quantity of goods sold to him on credit by the defendant subsequently to the mortgage, and which had not been paid for. Held, the mortgagee, having received actual

¹ *Oliver v. Eaton*, 7 Mich. 108.

³ *Hamilton v. Rogers*, 8 Md. 301.

² *Rose v. Bevan*, 10 Md. 466.

possession from the mortgagor under his executory agreement, could hold the goods against the defendant.¹

24. More especially, where an unfinished article is mortgaged, and afterwards finished with materials included in the mortgage; the mortgagee is entitled to the additional value derived from the materials and labor.² So the mortgagor of a vessel, having removed the old sails, which were worn out, and substituted new ones, and the vessel having passed into the hands of the mortgagee; held, the new sails passed with it, as in the case of repairs, and the mortgagor could not maintain *trover* for them.³ “The mortgagee was the legal owner of the sloop. (*Westerdale v. Dale*, 7 T. R. 312.) Lord Kenyon, speaking of the mortgage of a ship, says: — As to cases respecting the mortgagee, whether in or out of the possession, he is the legal owner, and must so be considered in a court of law, notwithstanding his title is subject to equitable interest. The title to the vessel in question being in the mortgagee, he became entitled to the sails which were affixed by the plaintiff, the moment the vessel came into his actual possession. We can see no difference between this case and that of ordinary repairs. The old sails were worn out, and they were removed, and others put in their place. When the materials of another are united to materials of mine, by my labor or by the labor of another, and mine are the principal materials, and those of the other only accessory, I acquire the right of property in the whole, by right of accretion. (*Merritt v. Johnson*, 7 Johns. R. 475.) Thus, in the case of the mortgage of a house, which contains fixtures. There, where the mortgagee obtains possession under the mortgage, *trover* could not be brought by the mortgagor to recover the fixtures, though the fixtures were not mentioned in the mortgage, and though they might have been removed by the mortgagor before possession obtained by the mortgagee. If the mortgagor could have removed the new sails before the actual possession by the defendants

¹ *Chapman v. Weimar*, 4 Ohio, (N. S.) 181.

² *Jenckes v. Goffe*, 1 R. I. 511.

³ *Southworth v. Isham*, 3 Sandf. 448.

under this mortgage, still, after such possession, the plaintiff's claim was gone, and trover could not be brought. The new sails were attached to the sloop. They became, in our opinion, a part of it, and in this condition the vessel came into the actual possession of the legal owner."¹

25. If a mortgagor mix other property of his own with the mortgaged goods, without the consent of the mortgagee, they become accessorial to the mortgaged property, and subject to the mortgage.² So where a mortgagor of goods, intrusted with the possession of them, intermixed them, intentionally or without due care, with his own goods, so that they could not be distinguished, and consigned them for sale to the defendant; held, the mortgagee might recover, in an action of trover, the value of the whole. It was the mortgagor's duty to keep the goods separately, and preserve the mortgagee's property. His intermixing them was a violation of his duty, and unlawful. As his own could not be distinguished, he could take none of the mixed parcel without taking the plaintiff's, which he had no right to do; and as against him and his consignees, the plaintiff must hold the whole.³ (*f*)

26. Where live stock is mortgaged, its natural increase and produce becomes subject to the mortgage.⁴

27. Whether issue of a mortgaged female slave, born after the title of the mortgagee has become absolute at law, and during the possession of the mortgagor, is liable for the payment of the mortgage debt, has been a point variously decided in different States.⁵ But, upon a bill in equity to foreclose a mortgage of slaves, of which the mortgagor re-

¹ Per Campbell, J., 3 Sandf. 449, 450, 451.

⁴ *Forman v. Proctor*, 9 B. Mon. 124.

² *Dunning v. Stearns*, 9 Barb. 630.

³ *Willard v. Rice*, 11 Met. 493.

⁵ *Turnbull v. Middleton*, Walk. 413; *Evans v. Merriken*, 8 G. & Johns. 39.

(*f*) On the other hand, it is held that if the property, by the permissive act of the mortgagee, is so intermixed with that of a former owner, as to prevent separation or identification, the rights of third persons ought not to be affected. *Hamilton v. Rogers*, 8 Md. 301.

tained possession; held, in order to avoid foreclosure, the mortgagor must pay a sum including the value, at the time of decree, of the slaves, and of the children born of the female slaves since the mortgage, and the net hire or use of the slaves, at least from the time of bringing the bill.¹

¹ *Fowler v. Merrill*, 11 How. U. S. 375.

CHAPTER XLIII.

CONCURRENT OR SUCCESSIVE MORTGAGES OF THE SAME PROPERTY.

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| 1. Concurrent mortgages. 2. A second mortgage is valid against third persons. 3. Whether a second mortgagee is entitled to immediate possession, or can maintain <i>trover</i> : proof of the <i>consideration</i> of a second mortgage. | 5. Distribution of the proceeds of mortgaged property between different mortgagees. 6. When a subsequent mortgage shall have precedence. 8. Mortgage, subject to other liens. |
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1. WHERE two mortgages are made and recorded at the same time, the mortgagees shall hold the property in proportion to the amounts of their respective claims or liabilities.¹ If neither mortgagee has notice, the mortgage first ratified has priority.²

2. A *second mortgage* of personal property is valid against all but the first mortgagee and his assigns ; and, if duly recorded, is good against creditors without formal delivery.³ And the second mortgagee may hold the property against an attaching creditor of the mortgagor, though the payment or discharge of the first mortgage be not recorded.⁴ So a statute, forbidding a second mortgage without a reference in it to the first, does not make the second mortgage void ; because the statute is designed to secure the rights of the second mortgagee, and the parties are not *in pari delicto*.⁵

3. But a second mortgagee is not entitled to immediate possession, and therefore cannot maintain *trover*.⁶ (a) Nor

¹ Aldrich v. Martin, 4 R. I. 520.

² Oxnard v. Blake, 45 Maine, 602.

³ Smith v. Smith, 11 Shepl. 555.

⁴ Ibid.

⁵ Leach v. Kimball, 34 N. H. 568.

⁶ Rugg v. Barnes, 2 Cush. 591.

(a) It is held, that, if there are several mortgages, all overdue, and the mortgagor holds the property contrary to the conditions of them, any mort-

can he bring trover against the first mortgagee, though the debt of the latter has been paid.¹ Thus, April 28th, 1846, certain personal property was mortgaged, and, on the 19th of June following, mortgaged again to the plaintiff. The mortgagor remained in possession till June 30th, when a creditor of his caused it to be attached by the marshal. July 7th, the plaintiff, and the next day the first mortgagees, made a demand according to law upon the officer. Within ten days after the last demand, it was agreed between the first mortgagees and the attaching creditor, that the officer should remove a part of the property and the keeper; that the mortgagees should take possession and dispose of the residue under their mortgage, and apply the proceeds to their claim, the balance of which should be paid by the creditor. The officer accordingly removed part of the property, and sold it on the execution, and on the 16th of July the first mortgagees took possession of the remainder, and disposed of it with the written consent of the mortgagor and the plaintiff. The creditor paid the balance of the first mortgagees' debt, taking an assignment of their mortgage, executed in February, 1847. September, 1846, the plaintiff brings trover against the officer, for the value of the property sold by him. Held, when the plaintiff made his demand, and at the commencement of the suit, he had a mere right of redeeming the first mortgage, and not the right of possession, and the action would not lie.²

4. Nor can a subsequent mortgagee maintain trover against a prior one, on the ground that the prior mortgage is invalid against him, for want of registration, or delivery of the property, without proof that his mortgage was made for valuable consideration, or to secure an honest debt.³ Thus, in trover

¹ Hume v. Breck, 4 Litt. 284.

³ Baskins v. Shannon, 3 Comst. 310.

² Rugg v. Barnes, 2 Cush. 591.

gagee, who first takes possession of the property, acquires a preference over the others, without regard to the date of the mortgage. Constant v. Malle-son, 22 Ill. 546.

by a second, against a first mortgagee, the plaintiff claimed under a mortgage, dated November, 1841, to secure payment of \$425. The defendant's mortgage was objected to, on the ground that it was not accompanied by change of possession, nor duly filed. To show the *bona fides* of his own mortgage, the plaintiff proved, that about a year before it was given he sold the mortgagor six hundred bushels of wheat, at \$1 per bushel, which was not paid for on delivery. He also produced two notes against the mortgagor of \$208.16 each, dated January, 1841, and payable in September, 1841. There was no evidence to connect either of these debts with the mortgage. Held, the action could not be maintained.¹ Jewett, J., says :² — " To show good faith in the making of a chattel mortgage, as between a subsequent mortgagee and the creditors of a prior mortgagee of the mortgagor, it is essential to show that the mortgage was made for a valuable consideration, or to secure the payment of an honest debt. (*Hanford v. Archer*, 4 Hill, 271.) There is no evidence to authorize a Jury to find that the mortgage to Baskins was made to secure the payment of the price of the wheat sold, or any portion of it, or the notes or either of them. The evidence wholly fails to connect either of those claims with the giving of the mortgage."

5. A court of chancery, in *marshalling securities* for the purpose of protecting the interests of a subsequent mortgagee, will take care that no injustice be done to him who has the prior security.³ But where an assignee had in his hands two funds, one of them specifically appropriated to his claim, and also subject to a subsequent mortgage; held, equity would not preclude him from satisfying his debt from either fund, nor compel him to resort to the personal security of the debtor, for the benefit of the subsequent mortgagee.⁴

6. Under special circumstances, a subsequent mortgage will take precedence of a prior one. Thus it is held that a

¹ *Baskins v. Shannon*, 3 Comst. 310.

² *Ib.* 311, 312.

³ *Butler v. Elliott*, 15 Conn. 187.

⁴ *Kendall v. N. E. Carpet Co.*, 13 Conn. 383. See *Pettibone v. Stevens*, 15 Conn. 19.

prior mortgagee cannot enforce his mortgage against an assignee of a second mortgage, who took the assignment when the first mortgage was overdue, and the mortgagor in possession, and without notice of the overdue mortgage; for this second mortgagee had a right to suppose that the first mortgage was paid.¹ And the same rule has been applied, even though the second was made expressly subject to the first mortgage. Thus a debtor, being called upon by a creditor for security, promised to give him a mortgage of personal property, and thereupon directed his attorney to draw up, 1st, a mortgage of his personal property, to secure another creditor; 2d, another mortgage, subject to the first, to secure the creditor who demanded security; 3d, a general assignment, under (Mass.) Stat. 1836, ch. 238, subject to the mortgages. The instruments were all executed and delivered, in this order, the same evening; the second mortgagee not knowing of the first mortgage till he received his own, nor of the assignment till after its delivery, and never afterwards assenting thereto. The first mortgage having been held void, as part of the assignment, and repugnant to the statute: held, the second mortgage was not part of the assignment; that it was valid at common law; and that, as against attaching creditors of the mortgagor, it was as effectual as if no prior mortgage had been made.² Putnam, J., says:³ — “The case of *Green v. Kemp*, 13 Mass. 515, has been relied upon to show that as the plaintiffs took their mortgage subject to the prior mortgage, they cannot be permitted to deny its validity. The objection to the first mortgage, in the case cited, was, that it was void for usury. The tenant had purchased the right of redemption. It was held, that a mortgage on a usurious consideration was void only as against the mortgagor and those who may lawfully hold under him. But the mortgagor might waive that legal objection, and pay his debt, without availing himself of the defence of usury. But in

¹ *Van Pelt v. Knight*, 19 Ill. 535.

² *Housatonic, &c. v. Martin*, 1 Met. 294.

³ *Ib.* 307.

the case at bar, the mortgagors had no such election or power. They had given a preference, contrary to the statute, and they could not avoid or repeal the statute. If this were a case between the first mortgagees and the plaintiffs, then the plaintiffs could not be permitted to deny that there was a prior mortgage; they must be considered as assenting and agreeing to hold, subject to all the claims which the first mortgagees might by law enforce; but not concluded from showing that the first mortgage had been paid, or that, by force of the statute, it was merely void, notwithstanding all the good will of the mortgagors to make it good. The plaintiffs do not claim under the first mortgagees, and the doctrine of estoppel, therefore, does not apply. So, where a mortgage was made by indenture, stating that the property was subject to a prior mortgage; and the mortgagor afterwards sold the property; and the mortgagee brings trover for it against the purchaser: held, the plaintiff was not estopped to show that the property was never mortgaged to the person named in the indenture as prior mortgagee; and that, if such a mortgage had been given, and the mortgagee had gained an absolute title by breach of condition, evidence of his afterwards receiving payment of the debt would warrant the Jury in finding that he had waived his title to the property.¹ Dewey, J., says: ² — “The defendant can with no propriety set up this estoppel, he not being a party to it, nor shown to have been in any way prejudiced by it. He has not acted upon it, or parted with any rights, upon the supposition that the property in this wire was in (the first mortgagees.) He does not connect himself with it in any way. The only ground upon which the defendant can urge this objection, is for the purpose of showing that the wire, the value of which the plaintiff seeks to recover in this action, was in truth the property of Rider or his assignee, and that the defendant is therefore responsible to Rider, and not to the plaintiff. Any competent evidence to show that Rider never had any claim

¹ Barry v. Bennett, 7 Met. 354.

² *Ib.* 361.

upon the wire, or if any, that it was discharged before the commencement of the present action, obviates that objection." So a part-owner of a ship at sea mortgaged his interest therein, and, after her return, mortgaged all his interest in her, "her appurtenances, outfits, cargo, and catchings," to another person, stating in the latter mortgage that the hull was subject to the first mortgage. The mortgagor and the other owner fitted out the vessel for a whaling voyage, with the knowledge of the first mortgagee, and the mortgagor furnished his share of the outfits. A few days before she sailed, the first mortgagee took formal possession of her, under his mortgage, no one interested being on board, but did not notify the mortgagor that he had done it. Upon the return of the vessel, her cargo was sold by the defendant, an agent of the several owners, who received the proceeds. Held, as between the two mortgagees, the second mortgagee was entitled to the mortgagor's share of such proceeds, and might maintain *assumpsit* as for money had and received to recover the same.¹ Dewey, J., says:² — "We do not understand that a mortgagee of a ship, who is not in possession, is necessarily connected with or answerable for outfits, or entitled to the earnings of the ship. The mortgagee might have taken possession of her, and insisted upon his right to retain possession. He might have insisted upon his right to coöperate in fitting her out, and to participate in her earnings. But not having done so, and contenting himself with a mere formal entry, and allowing others to fit her out and to act ostensibly as the owners of cargo, catchings, and profits, their interest in the earnings made by the voyage might be well transferred in mortgage, to secure others for liabilities or for advances. The secret entry made by Carney, without giving notice thereof to the mortgagors, or to the other part-owners, was nugatory and void, and no rights attached by reason of it."

7. Where a mortgagee of slaves takes from the mort-

Milton v. Mosher, 7 Met. 244.

² Ib. 248, 249.

gagor another mortgage on the same and other property, extending the law day and securing other creditors; the taking of the second mortgage is a waiver of the right to enforce the first. Hence, if the slaves are sold under the first mortgage, the creditor's possession of them under that sale is not adverse, so as to avoid a sale by the trustee under the second mortgage; but such possession is subordinate to the last mortgage.¹

8. Personal property may be mortgaged, when subject to any other lien, as well as that of a prior mortgage. Thus a vessel, with certain property on board of her, belonging to the owner, was seized and libelled, on the ground that she was engaged in business not authorized by her license. Afterwards, a petition, admitting the forfeiture, and praying for its remission, was filed by the owner of the goods in the United States District Court, and after due proceedings it was remitted by the proper authority. Previously to the remission, and while the goods were in custody of the law, they were mortgaged to the plaintiffs, and the mortgage was recorded. Subsequently to the remission and the registry, the defendant, an officer, levied an attachment upon the goods, and the plaintiffs replevy them. Held, the owner's admission was not conclusive against him as to the forfeiture, but he still had an interest in the property subject to the decision of the claim of the government, and, this claim having been relinquished, the mortgage should prevail over the attachment.² (*b*)

¹ *Billingsley v. Harrell*, 11 Ala. 775. ² *Mitchell v. Cunningham*, 29 Maine, 376.

(*b*) Mortgage, in Maine, of one half of a vessel, and afterwards of the whole to another person. The latter took possession, and afterwards insured the vessel, which was lost. The wreck, &c., being abandoned, were sold by an agent of the underwriters, who paid the insurance. Held, the first mortgagee, who had not taken possession, might recover half the proceeds of sale. *Rice v. Cobb*, Mass. S. J. C. (Suffolk,) March, 1852, Law Rep. June, 1852, p. 111.

The first mortgagee brought an action upon his mortgage notes, and

trusted the second mortgagee, who had taken possession more than sixty days after breach of condition, and thus gained an absolute title, and then received from the master freight previously earned, assuming certain charges against the ship. Held, the trustee was not chargeable for the insurance money, but was chargeable for the defendant's proportion of the net earnings in his hands, his debt having been previously *primâ facie* extinguished by taking possession under the mortgage. *Ib.*

CHAPTER XLIV.

DELIVERY AND POSSESSION; WHETHER NECESSARY TO THE TITLE
OF A MORTGAGEE.

1. General remarks upon the subject of absolute or conditional sales without change of possession. Effect of *registration*.

3. Delivery and possession are unnecessary *between the parties*, or as against *trespassers*.

4. Prevailing doctrine in relation to *creditors*, &c. Possession is merely *prima facie* evidence of fraud. Language of the Courts upon that subject.

13. English cases.

15. American doctrine and cases.

16. United States Courts.

17. New York.

23. Massachusetts.

24. Maine.

25. Vermont.

26. Connecticut.

27. New Hampshire.

28. North Carolina.

29. Maryland.

30. Alabama, Virginia, South Carolina.

31. Missouri.

32. Illinois.

33. Michigan.

34. Tennessee.

35. Ohio.

36. Indiana.

37. Kentucky.

38. Property not easily susceptible of delivery.

40. Who may take advantage of the want of delivery; purchasers, creditors, assignees, &c.

44. Who may take advantage of a delivery.

45. When the mortgagee has a right of action for the property or its value.

1. No topic in the law of mortgages has been more fruitful of doubt and discussion, than the question as to the necessity of *an original delivery* to, and *continued possession* by, the mortgagee, in order to give him a perfect title. Upon this subject, many of the rules, relating more particularly to *absolute sales*, are equally applicable to mortgages; but the plan of the present work does not include a reference to any decisions, except those which pertain directly to mortgages. It will be sufficient to remark, in regard to *fraudulent conveyances*, generally, as consisting in absolute or conditional sales without change of possession, that different Courts, and the same Courts at different times, have held widely different doctrines; sometimes treating the conveyance as absolutely void for this cause, sometimes as

primâ facie void, but open to explanation by evidence of consideration and an honest purpose, and sometimes (though rarely) as valid, until impeached by affirmative evidence of fraud.

2. No formal delivery of personal chattels mortgaged is necessary, if the mortgage is duly executed and recorded according to the statute law.¹

3. As *between the parties*, a mortgage is in general valid without change of possession.² (a) A creditor, who does not show that he was such at the date of the mortgage, is not in position to attack it as fraudulent, on the ground that it allows the mortgagor to remain in possession, and dispose of the property.³ So, also, possession is unnecessary as against mere trespassers, without color of title.⁴ Thus a mortgagee of lumber, in possession and charge of a third person, in and about a mill, went to the mill to take possession, and desired the third person to take possession for him, and to take charge of it as before, to which he did not object. A son of the mortgagor, as his agent, accompanied the mortgagee for the purpose of giving him possession. Held, the mortgagee's possession was sufficient to sustain trespass against one who showed no title, for taking the lumber.⁵

4. With regard to *creditors* of, and *subsequent purchasers* from, the mortgagor; the prevailing doctrine, as established by the general current of later decisions, is, that continued possession of the mortgagor is *primâ facie*, but not conclu-

¹ Call v. Gray, 37 N. H. 428.

² Hall v. Snowhill, 2 Green, 8; Smith v. Moore, 11 N. H. 55; Winsor v. McLellan, 2 Story, 492. See s. 40.

³ Gay v. Bidwell, 7 Mich. 519.

⁴ Goodenow v. Dunn, 8 Shepl. 92.

⁵ Morse v. Pike, 15 N. H. 529.

(a) In relation to the mortgage of a *ship*, Parker, C. J., says (Tucker v. Battlington, 15 Mass. 480): — "It may well be doubted whether a mortgagee, who might have taken possession, but never has, can be considered as owner to any purpose whatever."

sive, evidence of fraud ; that the burden of proof is upon the mortgagee, and the question for the Jury.¹

5. Eminent Judges have used the following language with regard to the necessity of delivery, and the legal consequences resulting from the mortgagor's continued possession.

6. "Delivery of the subject-matter of the contract is as requisite in the case of a mortgage of goods, as it is in the case of an absolute sale."²

7. "In all cases of personal property mortgaged, the mortgagee ought to take possession or place his lien on record for notice to the world."³

8. "By the general rule of the common law, upon a transfer of goods, whether absolute or conditional, as against third persons, there must be a delivery, and in general, also, the custody and possession of the goods must be retained by the vendee."⁴

9. "In a mortgage of lands, the possession usually remains with the mortgagor, and the grantor is entitled to receive the rents until the grantee is entitled to demand the money ; but not so of personal property. In *Ryall v. Rowles*, 1 Ves. 348, 1 Atk. 165, though it was a case depending on the bankrupt laws, and does not decide the general question at common law, or under the statute of Elizabeth, yet the opinions of the Judges have a direct bearing on the question. Burnet, J., draws the true distinction between the mortgage of goods and lands. There is no way of coming at the knowledge of who is the owner of goods, but by seeing in whose possession they are. The title-deeds give the information as to lands. Therefore, in equity, a first mortgagor (mortgagee) will be postponed, if he neglects to take them into his possession. He is punished for this as a fraud. A mortgage is an immediate sale. Although afterwards by performing the condition, under the indulgence of a court of

¹ See *Luckenbach v. Brickenstein*, 5 W. & S. 149 ; *Leland v. Medora*, 2 W. & Min. 116, 117.

² Per Gibson, J., *Clow v. Woods*, 5 S. & R. 278.

³ Per Woodbury, J., *Leland v. Medora*, 2 W. & Min. 103.

⁴ Per Shaw, C. J., *Bullock v. Williams*, 16 Pick. 34.

equity, the thing may be redeemed, yet, till the performance, the conditional vendee is the absolute proprietor thereof, though subjected to be divested by performance. There is a difference between the mortgage of land and the pledge of goods. The mortgagee has an absolute interest in the land, whereas the pawnee has but a special property to detain them as his security.”¹

10. “The possession of the vendor, whether the sale be absolute or conditional, is only evidence of fraud; which, with the manner of the occupation, the conduct of the parties, and all other evidence bearing upon the question of fraud, is for the consideration of the Jury.”²

11. “Cases may present themselves where the form of the conveyance and the stipulations of the contracting parties are of such obviously illegal character and purpose, that it may be the duty of the Court to pronounce them fraudulent in law, and wholly ineffectual; but in general, wherever the terms and stipulations of a contract are by possibility compatible with good faith, and have upon the face of them the essential elements of a legal contract, the question of fraudulent intent and want of good faith, is to be submitted to the Jury. The party, who alleges the transfer to be fraudulent, may submit to the Jury all the supposed badges of fraud, arising from the form of the conveyance and the stipulations in favor of the vendor, which tend to raise a presumption of fraud. But they will be open to explanation.”³

12. In proof that possession of the mortgagor cannot *per se* constitute fraud, it is said that, if this were the case, “there could be no such thing as a mortgage of chattels; for the very idea of a mortgage *ex vi termini* implies that the possession is to remain with the mortgagor.”⁴

13. It is unnecessary to cite all the English cases upon this subject. Their general, though not uniform doctrine, is

¹ Per Duncan, J., *Clow v. Woods*, 5 S. & R. 283, 281.

² Per Morton, J., *Shurtleff v. Willard*, 15 Pick. 211.

³ Per Dewey, J., *Jones v. Huggeford*, 3 Met. 517.

⁴ Per Hoffman, J., *Lewis v. Stevenson*, 2 Hall, 82.

as above stated. A few of the leading decisions may be referred to. (*b*)

14. One of the earliest cases was as follows. Wilson exercised the trade of a victualler, during which time the plaintiff furnished him with ale, for which a large debt was contracted. Afterwards, becoming an innkeeper, Wilson borrowed money of the defendant, his lessor, to buy goods for furnishing his house, and for security made a bill of sale of the goods to the defendant, but retained possession. The plaintiff continued to sell Wilson drink, for which Wilson was indebted as before. Afterwards, Wilson, not being able to continue his trade, made an agreement with the defendant to give him security by a new bill of sale of the same goods and others. But before executing it, by contrivance with the plaintiff, he committed an act of bankruptcy. The defendant, not knowing the trick, accepted the new bill of sale. The plaintiff sues a commission of bankruptcy against Wilson, and obtains an assignment from the commissioners, and thereupon brings trover for the goods. Holt, C. J., said: — "If these goods of Wilson's had been assigned to any other creditor, the keeping of the possession of them had made the bill of sale fraudulent as to the other creditors. But since the original agreement was thus, and that honestly and really made for securing the money of the defendant Mills, which he had lent to Wilson for this purpose, the agreement was good and honest."¹ So a partner in a brewery mortgaged his share in the brew-house, utensils, and debts, but continued to carry on the business as before. Held, the mortgage was invalid, a mortgagee of goods or choses in action being bound, as the true owner, to take actual possession, as far as he can, of the goods, or the key of the warehouse, and of the muniments by which the choses

¹ *Meggott v. Mills*, 1 Ld. Ray. 286, 287.

(*b*) See *Cadogan v. Kennett*, Cowp. 436; *Minshull v. Lloyd*, 2 Mees. & W. 450; *Nunn v. Wilson*, 8 T. R. 521; *Riches v. Evans*, 9 C. & P. 640; 1 *Smith's Lead. Cas.* 33, and notes.

in action may be recovered.¹ In the same case,² a mortgage of goods was held to stand on the same footing, in regard to possession, as an absolute sale; and to give the mortgagee, if the mortgagor retained the property in his hands, no specific lien against general assignees under a commission of bankruptcy. Although the decision turned directly upon the bankrupt act, the general principle was laid down and affirmed, that a mortgagee, like an absolute purchaser, must take possession, in order to prevent the presumption of a purpose to obtain collusive credit; and that the mortgagor's continued possession was fraudulent at common law, and void by the statute of Elizabeth.

15. In the United States, great diversity of opinion has prevailed upon this subject, as a summary of the leading cases will show. More especially in the State of New York, different Judges have adopted widely different views; and the attempt to harmonize them by express legislation has itself given rise to questions hardly less embarrassing than those which it was designed thus to settle.

16. It has been held in the United States Court, that a purchaser of mortgaged property, retained by the mortgagor, even after breach of condition, cannot hold it against the mortgagee, if he had actual notice of the mortgage before payment of the purchase-money.³

17. Chancellor Kent says: — "It may now be considered as finally settled in the jurisprudence of New York, and as the true doctrine of the Revised Statutes, that leaving the possession of chattels, on sale, or mortgage, or assignment in the hands of the vendor, or mortgagor, or assignor, is only presumptive evidence of fraud, and it rests with the defendant to rebut that presumption, as a matter of fact, by showing proof of good faith, and an honest debt, and an absence of intent to defraud."⁴

18. The statutory provisions referred to are thus stated by

¹ Ryall v. Rolle, 1 Wils. 260.

² 1 Ves. 348; 1 Atk. 165.

³ Fowler v. Merrill, 11 How. 375. See Hamilton v. Russell, 1 Cranch, 309,

316; U. S. v. Hooe, 3 Ib. 73, 89; Conard v. The Atlantic, &c., 1 Pet. 338, 449; De Wolf v. Harris, 4 Mass. 515.

⁴ 2 Kent, 530, n.

Cowen, J. :¹ — “ By 2 N. Y. Rev. Stat. 70, s. 5, every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied with an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged or assigned, shall be presumed to be fraudulent and void, as against the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers. Subsequent sections 9 and 10, Ib. 71, declare such a mortgage absolutely void without any qualification, unless it be filed in the clerk's office of the town where the mortgagor resides.”

19. One of the earliest cases in this State was as follows : Demise of a house for one year, and, to secure the rent, a bill of sale of the tenant's furniture in the house, with delivery of one article in the name of, and as and for the whole, conditioned to be void upon payment of the rent, and also provided that the acceptance of the bill of sale should not impair the right of distress. The tenant retained possession of the property. On the day when the quarter's rent fell due, the tenant and the defendant took a part of the furniture, and carried it to the defendant's house. The defendant claimed the property under color of a purchase from the tenant, having paid a valuable consideration, but with intent to defeat the plaintiff's security. Held, the plaintiff might maintain *trover*, possession being only *primâ facie* evidence of fraud, open to explanation, and the mortgagor's possession in this case being consistent with the face of the deed. The Court say : — “ The fraud was all on the part of the defendant, for he purchased and took away the goods in the night,

¹ White v. Cole, 24 Wend. 121. See Walker v. Snediker, 1 Hoffm. Ch. 145; Levy v. Welsh, 2 Edw. Ch. 438.

with the intent to defeat the claim of the plaintiff. It is impossible that his title thus acquired can prevail.”¹

20. In *Sturtevant v. Ballard*,² the rule, that the retaining of possession by the vendor is fraudulent against creditors, even though the agreement appear upon the deed, unless some lawful motive be shown for it; was held applicable alike to conditional and absolute sales. In *Marsh v. Lawrence*³ it was held, that, in the case of mortgage *to indemnify a surety*, the mortgagor's possession is not evidence of fraud. In *Bissell v. Hopkins*,⁴ the Court, in a learned and elaborate opinion, remark : — “ Whichever way the decisions may tend upon the question of possession in the vendor, after a voluntary, direct, and absolute bill of sale, so far as the statute of Elizabeth is concerned, no doubt can be entertained at this day, that a continued possession in a *mortgagor* of chattels is not *per se*, evidence of fraud, either as to purchasers or creditors.” In *Divver v. McLaughlin*,⁵ it was held that a mortgage, where the mortgagor was allowed to retain possession and act as owner for two years and a half after it became absolute, was in law fraudulent and void as to creditors, however honest the intention of the parties might have been. In *Murray v. Burtis*⁶ it is held, that if the continued possession of a mortgagor is not explained, the question as to its effect is for the Court. If an explanation of it is offered, the question is for the Jury. In *Look v. Comstock*,⁷ the mortgagor's temporarily resuming possession, after once delivering the property, was held to have the same legal effect, as retaining it from the beginning. In *Doane v. Eddy*⁸ it was held, that under the Revised Statutes there is no distinction, with respect to the point now under consideration, between a mortgage and an absolute bill of sale; that in both actual and continued change of possession is necessary, unless the contrary

¹ *Barrow v. Paxton*, 5 Johns. 258, 262.

² 9 Johns. 337.

³ 4 Cow. 461.

⁴ 3 Ib. 205, n.

⁵ 2 Wend. 596; acc. *Collins v. Brush*, 9, 198.

⁶ 15 Wend. 212.

⁷ 15 Ib. 244.

⁸ 16 Ib. 523; acc. *Randall v. Cook*, 17, 53.

is satisfactorily explained, even though the transfer was made in good faith, and with no intent to defraud.

21. Where the property was in the possession of a third person, immediate delivery was held unnecessary. Thus property mortgaged to the defendant, and at the time in the hands of a third person, was seized by the plaintiff upon an execution against the mortgagor, while still in such third person's possession, who claimed it under a purchase from the mortgagor, prior to the mortgage. The plaintiff brings trover against the defendant for taking the property. Held, the mortgage was valid.¹ Nelson, C. J., says:²—"The case did not fall within the statute 2 R. S. 136, § 5, and nothing short of actual fraud could invalidate it. Weeks, in whose possession it was, claimed as purchaser from Grosvenor, and upon the proofs, he undoubtedly could have held it as respected him. Whether he could have done so, as respected creditors, might be questionable. The property therefore was not only out of the possession, but beyond the control, of the mortgagor. The statute does not require that the mortgagee shall take the actual possession of the property at the time, himself; it is enough if he removes it out of that of the mortgagor; and if he finds it in the custody of a third person, when the sale or mortgage is made, we do not perceive anything in the language, or in the object, or policy of the act, against permitting it to remain with him till such time as he may choose to take the personal charge of it. Leaving the property in this condition, is certainly not within the mischief of leaving it in the possession of the vendor or mortgagor."

22. In *Smith v. Acker*,³ it was held, that a mortgage unaccompanied by delivery, and not followed by actual and continued change of possession, was not void, provided it was affirmatively proved, that the transfer was made in good faith, and without the intent to defraud purchasers or creditors; and the intent was a question for the Jury. In *Cole*

¹ *Nash v. Ely*, 19 Wend. 523.

² *Ibid.* 524.

³ 23 Wend. 653.

v. White,¹ a mortgage was held to be good, notwithstanding the mortgagor's continued possession, if proved to be *bonâ fide* : and a previous, contrary decision in the same case was overruled.² In *Butler v. Van Wyck*,³ it is held, that, if a mortgage is made for a *bonâ fide* debt, the question of fraud as to creditors, arising from continued possession in the mortgagor, must be submitted to a Jury, whether such possession be satisfactorily explained or not. In *Thompson v. Blanchard*,⁴ Jewett, J., says : — " The law presumes the transfer of the property, unaccompanied by delivery and continued change of possession, to be fraudulent and void as against the creditors and subsequent purchasers in good faith of the vendor, mortgagor, or assignor. That is, the law, under such circumstances, presumes that the transfer was without consideration or without a sufficient one, and also that there was some secret trust or an intent to defraud purchasers or creditors ; unless there be satisfactory proof, that the transfer was made not only in good faith, but that it was without any intent to defraud purchasers or creditors." In *Bishop v. Cook*,⁵ the question is held to be for the Jury ; and a verdict will not be set aside, unless *clearly* wrong.⁶ In *Otis v. Sill*,⁷ the New York act of April 29, 1833, in relation to chattel mortgages, was held not to repeal the statute concerning fraudulent conveyances. It only added another to the grounds, on which a mortgage will be declared void. The object of the act was to create an additional official guard against fraud or collusion, by requiring the mortgage, or a copy thereof, to be filed. The filing of the mortgage does not rebut the presumption of fraud, arising from non-delivery, or excuse the mortgagee from affirmatively showing, where there is no change of possession, that the mortgage was made in good faith, and without intent to defraud. The only effect of the act is, to require the party, in addition to such proofs, to show that the mortgage, or a copy thereof

¹ 26 Wend. 511.

² *Ibid.* 24 Wend. 116.

³ 1 Hill, 438, Bronson, J., dissenting; acc. *Butler v. Miller*, 1 Comst. 499.

⁴ 4 Comst. 307.

⁵ 13 Barb. 326.

⁶ *Swift v. Hart*, 12 Barb. 530.

⁷ 8 Barb. 102.

has been filed. In *Frost v. Willard*,¹ the statutes, declaring conditional sales and mortgages of personal property void, unless there is a delivery, or true copy of the mortgage filed, &c., were held not to apply to contracts relating to goods thereafter to be manufactured. In such contracts there must be *fraud in fact* to render the contract void. In *Curtis v. Leavitt*,² the provision in the statute, that every assignment in *goods and chattels*, by way of mortgage, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession, shall be presumed fraudulent, is held to apply only to *goods* and other things of which possession can properly be predicated, not to what the law denominates *things in action*. In *Hull v. Carnley*,³ a provision, that the mortgagor may retain possession until a default, is held not evidence of such a trust as will invalidate the mortgage under the statute; and, if the continued possession of the mortgagor under such provision is any evidence of fraud, it can only raise a presumption which may be rebutted. The finding of a jury, or of a judge trying the case without a jury, negating an intent to defraud, is conclusive. In *Groat v. Rees*,⁴ it is held that a mortgage must be proved *bonâ fide*, and also not fraudulent against creditors. In a mortgage permitting the mortgagor to have possession, a seizure by *distress* is a breach of the condition that, the mortgagor shall not attempt to sell, assign, secrete, or otherwise dispose of the chattels.⁵

23. In Massachusetts, the continued possession of a mortgagor is held to be only *primâ facie* evidence of fraud. Thus a vendee took from the vendor the following writing, signed by the latter: "A. bought of B.," &c., (enumerating the articles and prices.) "Received payment." The property was delivered, but returned to the vendor, and afterwards attached as his. Held, the vendor's possession was not conclusive evidence of fraud, and, after a suggestion of fraud, parol evidence was admissible to prove the transaction a

¹ 9 Barb. 440.

² 17 Barb. 309.

³ 2 Duer, 99.

⁴ 20 Barb. 26.

⁵ *Conkey v. Hart*, 4 Kern. 22.

mortgage. The instrument was said to be, not a bill of sale, but a bill of parcels, not stating the terms of the contract, but resembling a receipt, although, unexplained, it would be sufficient to pass the property.¹ And more especially will the mortgage be held good as against the administrator of a deceased mortgagor; and where, from the nature of the property, actual change of possession was impracticable or inconvenient. Thus the plaintiff being liable, as surety for one Jewett, for \$1,350, the latter gave him a bill of parcels of certain logs, valued therein at \$1,602.44; and acknowledged receipt of payment "by indorsing for me at the Kennebec Bank for the sum of \$1,350." The bill of parcels was made for the purpose of protecting the plaintiff against his liability, and with the understanding that any surplus was to be refunded to the debtor. Jewett, at the time, directed the witness to the bill to deliver the logs to the plaintiff, and the witness afterwards showed them to the plaintiff, they being then rafted, at a mill, in a boom. The next day after making the bill of parcels, Jewett died, leaving his estate insolvent. The plaintiff had paid no part of the debt for which he was liable, but a suit was pending against him. The defendant, the administrator, took possession, and made an inventory of the logs, caused them to be sawed, and sold part of the boards. The plaintiff took no care of the property; but the defendant took care of it, and it would otherwise probably have been lost. About ten days after the death of Jewett, while the logs were being appraised, the plaintiff showed the defendant his bill, but neither claimed nor demanded them in any other way. The plaintiff brings trover for the value of the logs. Held, the action should be maintained. The Court say: — "There was all the delivery which could have been usefully made of property of this nature. A person was appointed by the vendor to deliver the logs lying within a boom, who went within sight of them with the vendee, and showed them to him. This was as effectual for such kind of property, as a delivery over in

¹ *Fletcher v. Willard*, 14 Pick. 464.

hand of a chattel capable of such personal possession. There was no necessity afterwards, that the vendee should place a person over the logs to take care of them for him. He did as others do with similar property; suffered it to lie within a boom, until he should have occasion to use it; and when the defendant claimed the logs, as belonging to the estate of his intestate, the plaintiff exhibited his bill of parcels, and declared them to be his property. Nor will the acts of care or ownership exercised by the defendant as administrator vary the case; for it was his duty to protect from waste and accident property belonging to the estate, which had been pledged for a sum less than its value, as he might eventually have to administer upon this very property.”¹ So where there was a bill of sale of machines in a manufactory, on condition to be void upon payment of an accompanying note, and the vendee took possession by putting his hands on each piece, and then gave the vendor a lease: held, a mortgage, and that the vendor’s continued possession was only *primâ facie* evidence of fraud.²

24. In Maine, the possession of the mortgagor has been held *primâ facie* evidence of fraud.³ And it is said: “Until the passage of some late statutes, concerning registration, mortgages of movables, it is believed, have uniformly been held inoperative against attaching creditors; unless accompanied by a delivery of the property mortgaged, either actually or symbolically.”⁴ But where the mortgagor of a horse, to secure a debt and future advances, made a formal delivery, but remained in possession, and used the horse as his own; and the transfer was not known to persons in the neighborhood; and the mortgagor afterwards sold the horse, the purchaser buying him *bonâ fide*, without notice, and for valuable consideration: held, the mortgagee might reclaim the property from such purchaser; continued possession being consistent with the nature of a mortgage, till a breach,

¹ *Jewett v. Warren*, 12 Mass. 300, 302, 303.

³ *Reed v. Jewett*, 5 Greenl. 96.

⁴ Per Whitman, C. J., *Goodenow v. Dunn*, 8 Shepl. 92.

² *Howes v. Crane*, 2 Pick. 607.

though not with that of a pledge.¹ And, in the same State, it is said, the rule, that, where one of two innocent parties must suffer by the fraud of a third, he must bear the loss who confided in the fraudulent party, does not apply to the case of a mortgage of chattels, without change of possession, so as to throw the loss of a subsequent sale by the mortgagor upon the mortgagee, instead of the purchaser. The rule would apply with the same force to any bailee of property.² So, if the mortgage is made at the time when the mortgagor buys the property, and no formal delivery is made to him; it has been held that the mortgagee's title is good against creditors. Thus, where a bill of sale and a mortgage back for the price were made at the same time, in the room where the chattels were, but without formal delivery; and the mortgagor took possession: the mortgagee's title was held good against an attaching creditor of the mortgagor.³

25. In Vermont it has always been held, that a sale without change of possession is void against creditors of the vendor; (c) and this principle is held applicable to a mortgage given back to the vendor at the time of sale. Thus, where a sale was made, and notes and a mortgage of the property given back as security for the price, but the mortgagor took and retained possession; held, the transaction could not be treated as a sale from the original owner, which was not to be perfected or completed till performance of a condition; that his title accrued by the mortgage, and was in no way aided by his prior ownership; and that the mortgage was void as against creditors of the mortgagor.⁴ And this rule applies to a mortgage of the machinery of a woollen factory, left in the possession of the mortgagor, whether mortgaged with or without the factory.⁵ (d) So a mortgage

¹ *Lunt v. Whitaker*, 1 Fairf. 310.

² *Lane v. Borland*, 2 Shepl. 77.

³ *Smith v. Putney*, 6 Shepl. 87.

⁴ *Woodward v. Gates*, 9 Verm. 358; acc. *Skiff v. Solace*, 23 Verm. 285.

⁵ *Sturgis v. Warren*, 11 Verm. 433.

(c) If a *pawnce* receives the property, but immediately redelivers it, he loses his title. *Fletcher v. Howard*, 2 Aik. 115.

(d) By the Revised Statutes, no mortgage of any machinery, used in a

executed in New York, and valid by the laws of that State without change of possession, will not protect the property from attachment in Vermont, if found there in the mortgagor's possession, though taken to Vermont for a temporary purpose.¹ Kellogg, J., says: ² — "The validity of the plaintiff's lien, by the laws of New York, is conceded, and, as between the parties to the mortgage, it may be admitted to be valid and binding, wherever the property may be found. Admitting the validity of the mortgage in New York, it by no means follows, that it is to be received and recognized here, to defeat attachments made by our own citizens. This is not required by the comity of States. The case presents simply a question of conflicting liens. The property in question, when brought here, became subject to our laws and liable to attachment. The defendant (the officer) was not a party to the contract under which the plaintiff (the mortgagee) claims to hold the property."

26. In Connecticut, possession has been held as necessary in case of mortgage, as of an absolute sale.³ (*e*)

27. In New Hampshire, in *North v. Crowell*,⁴ Gilchrist, J.,

¹ *Skiff v. Solace*, 23 Verm. 279.

² *Ib.* 284, 285.

³ *Swift v. Thompson*, 9 Conn. 63.

See *Patten v. Smith*, 5, 196.

⁴ 11 N. H. 254; acc. *Ash v. Savage*, 5 N. H. 545.

factory, shop, or mill, is good except between the parties, unless possession be delivered to and retained by the mortgagee. Verm. Rev. Stats. 1839, 317. See Gen. Stats. 1863.

(*e*) In Connecticut, there may be a mortgage of manufacturing machinery, without the real estate to which it is attached; and the mortgage is effectual, though the mortgagor retain possession of the machinery. Conn. Stats. 1838, 72, 73.

The statutory provision, that, "whenever the occupant of any dwelling-house, having a family, shall mortgage the household furniture used by him in housekeeping, by a deed in which such furniture shall be particularly described, and which shall be executed, acknowledged, and recorded, in all respects as mortgages of lands are required to be, such mortgage shall be effectual, although the mortgagor shall retain possession of such mortgaged property;" applies to the furniture of a hotel kept by the mortgagor, and in which he resides, with his family. *Crosswell v. Allis*, 25 Conn. 301.

remarks: — “Possession by the vendor after an absolute sale of chattels is not conclusive evidence of fraud. It is only *primâ facie* evidence, and is conclusive only when unexplained. And we certainly should not apply a more rigid rule to the case of a mortgage. The length of time that the mortgagor remains in possession, although the act of 1832 implies that he may retain possession, may, under the peculiar circumstances of a case, be considered by the Jury, as tending to show fraud; but it is a matter susceptible of explanation.”

28. In North Carolina, the same general doctrine is adopted, and applied to the case of an absolute conveyance, with a defeasance back. Thus, in *detinue* for a negro, it appeared that Bryant was indebted to Pearson, who recovered two judgments against him. Bryant stayed the executions, giving the plaintiff security for the debts, and, to indemnify him, executed an absolute bill of sale to him for the negro in question. At the same time, the plaintiff gave Bryant an instrument under seal, acknowledging the purpose of the bill of sale, and promising to surrender it under a penalty, if Bryant paid the judgments on or before a certain day. Bryant continued in possession, and a creditor, to whom he was indebted before the sale, levied an execution upon the negro, who was sold by a constable to the defendant. The bills of sale to both plaintiff and defendant were duly proved and registered, but the defeasance was not, until the day of trial of this action. The defendant had knowledge of the conveyance to the plaintiff and the bond, before suing out his execution. Held, the action could not be maintained.¹ Taylor, C. J., says: — “To separate the defeasance from the deed, is always a suspicious circumstance. Both deeds were registered within the time required by law, yet the latter not being registered until the moment of trial, is strongly indicative of a wish in the parties to cover half the transaction with the veil of secrecy. The plaintiff may be considered in the light of a creditor of Bryant’s, who,

¹ *Gaither v. Mumford*, 2 Tayl. 167.

by being permitted to retain the possession contrary to both deeds, was thus enabled by the plaintiff to gain a delusive credit." Daniel, J., says: ¹ — "To all the world but the parties, this bill of sale must be considered absolute; and, as the property did not follow and accompany the deed, the transaction is *per se* fraudulent. The defendant's having notice, can make no difference." Ruffin, J., says: — "The bond or defeasance, as it is called, is not an instrument, which the law directs or authorizes to be registered. It is concealed, until the party is compelled to produce it, by a seizure of the goods. It then comes to light, and contradicts what the deed has before said. One of them must be false; and take which you will, it equally is a fraud." But where a bill of sale of a horse was on its face absolute, but taken as security for a debt, and possession left with the vendor; and, after being kept by the debtor six years, the horse was seized on execution by another creditor: the question of fraud was held to be for the Jury.² And in the same State it is held, that the mortgagee is not required ever to take possession before forfeiture; nor is the continued possession of the mortgagor adverse, or such as to create a bar under the statute of limitations.³

29. In Maryland, a mortgage of personal property is valid, although the mortgagor retain possession until and after the forfeiture.⁴

30. In Alabama, it is held that the possession of a mortgagor is not fraudulent, being consistent with the terms and effect of the transfer.⁵ Nor is his possession even after the *law day* conclusive evidence of fraud.⁶ So in Virginia.⁷ So in South Carolina.⁸

¹ Gaither v. Mumford, 2 Tayl. 171.

² Howell v. Elliott, 1 Badg. & Dev. 76.

³ Joyner v. Vincent, 4 Dev. & B. 512.

⁴ Hudson v. Warner, 2 Har. & G. 415.

⁵ Magee v. Carpenter, 4 Ala. 469; Wiswall v. Ticknor, 6 Ib. 179; Desha v. Scales, Ib. 356; Simerson v. The Branch, &c. 12 Ib. 205, 213.

⁶ Beall v. Williamson, 14 Ib. 55.

⁷ Rose's, &c. v. Burgess, 10 Leigh, 186; Clayborn v. Hill, 1 Wash. 177; Glascock v. Batton, 6 Rand. 78.

⁸ Gist v. Pressley, 2 Hill, Ch. 318, 328; Maples v. Maples, Rice, Eq. 301; Bank v. Gourdin, 1 Speers, Eq. 441, 459; Fishburne v. Kunhardt, 2 Ib. 566.

31. In Missouri, possession by a mortgagor is held conclusive evidence of fraud as against prior or subsequent creditors.¹

32. In Illinois it has been held, that, unless the mortgagor's possession is consistent with the terms of the mortgage, it is *per se* fraudulent.² But it is also held, that a mortgage is valid without transfer of possession, if *bonâ fide*, and if the continuance of possession is consistent with the deed.³ So a stipulation in a chattel mortgage, "that the mortgagor may retain possession of the mortgaged property ; but in case the chattels, or any part thereof, shall be attached or claimed by any person, at any time before the payment of the money secured, or in case the mortgagor shall attempt to sell them, without the consent of the mortgagee, then the latter shall have the immediate right to the possession of the whole of the said chattels to his own use ;" is not fraudulent or against the policy of the law.⁴ In a late case it is held, that possession of the mortgagor after default is a fraud *per se*, not open to explanation. And if after default such property be sold on execution as the mortgagor's, the mortgagee cannot recover it of the purchaser. But the time allowed to take possession after default must depend upon the circumstances of each case.⁵

33. In Michigan, where a mortgage was made of goods in a store, and no announcement of the fact made, the goods were not moved, and the same clerk continued to have charge of the store and goods, and made use of the same books of account, though acting in fact as the agent of the mortgagee ; held, the mortgage was invalid against a mortgage of later date but prior registry.⁶

34. In Tennessee, a mortgagor's continued possession after the time of payment is *primâ facie* evidence of fraud. Otherwise with possession before the day of payment, because it is

¹ King v. Bailey, 6 Mis. 575.

² Rhines v. Phelps, 3 Gilm. 464.

³ Thornton v. Davenport, 1 Scam.

⁴ Prior v. White, 12 Ill. 261.

⁵ Reed v. Eames, 19 Ill. 594.

⁶ Doyle v. Stevens, 4 Mich. 87.

understood to be in virtue of a tacit or presumed agreement.¹ But it has been held, that, where personal property mortgaged is left in possession of the mortgagor, and he sells it, the mortgagee cannot follow the property into the hands of the purchaser.²

35. In Ohio, a mortgage, where the mortgagor retains possession by virtue of it, with a power of sale, is void as against subsequent purchasers and execution creditors. But when possession is taken by the mortgagee, the mortgage becomes valid as against execution creditors, not having made a levy, and subsequent purchasers.³

36. In Indiana, possession is not conclusive evidence of fraud.⁴ But, if the mortgagor remains in possession, with the mortgagee's permission, and uses and disposes of the goods as his own; the mortgage has been held void.⁵

37. In Kentucky, where possession is not inconsistent with the deed, the question of fraud is for the Jury.⁶ Possession of goods by a mortgagor has been held to be not even *evidence* of fraud,⁷ the *title* not passing by a mortgage till forfeiture.⁸ On the other hand it has been held, that such possession may be *evidence* of fraud.⁹ (*f*)

38. Where the property mortgaged is of a nature which does not easily admit of a change of possession, the rule more especially applies, that the retaining of possession by

¹ Callen *v.* Thompson, 3 Yerg. 475; Maney *v.* Killough, 7 Ib. 440; Mitchell *v.* Beal, 8 Ib. 142. See Wiley *v.* Zashlee, 8 Humph. 717.

² Hurt *v.* Reeves, 5 Hey. 50.

³ Brown *v.* Webb, 20 Ohio, 389. See Collins *v.* Myers, 16 Ohio, 547; Chapman *v.* Wiemer, 4 Ohio, St. 481; Congreve *v.* Evetts, 10 Exch. 298.

⁴ Watson *v.* Williams, 4 Blackf. 26.

⁵ Jordan *v.* Turner, 3 Blackf. 309.

⁶ Laughlin *v.* Ferguson, 6 Dana, 117.

⁷ Snyder *v.* Hitt, 2 Dana, 204; Bucklin *v.* Thompson, 1 J. J. Mar. 223; Head *v.* Ward, Ib. 280.

⁸ Head *v.* Ward, Ib.

⁹ McGowen *v.* Hoy, 5 Litt. 239.

(*f*) A slave was given by the owner to his daughter, kept by her seven years, and during that time mortgaged by her husband. The slave was afterwards returned to the donor, and given by him to another daughter, who kept the slave for a year or two. The father finally devised the slave to the first donee. Held, the slave was held by the mortgage, and should be sold under it. Wolfe *v.* Bate, 9 B. Mon. 208.

the mortgagor is not a fraud upon creditors. Thus a windmill was taken on execution against the person who was in possession of it, with the farm on which it stood. He had previously mortgaged the farm, describing it as "one on which he had lately erected and placed a windmill." In the same deed he sold the windmill to the mortgagee, *habendum*, &c., provided, that if the debt should be paid at such a day, the deed should be void. No change of possession of the farm or mill followed. The mill was so constructed as to be removable at pleasure. In an action by the mortgagee against the sheriff, held, the transfer of the mill was effectual against creditors. Dallas, C. J., says:—"The next question is, whether, taking it to be a chattel, there has been such a possession of it as will pass the property? Now this is not a case in which a separate and actual possession could have been taken; for, whether the mill was legally a fixture or not, it was at all events actually fastened to the land, and it was not to be expected, that the mortgagee should come to reside in a mill. The present case is that of a mortgage, where the mortgagee, in conformity with the usual practice in such matters, permits the mortgagor to remain in possession. The constructive possession of the land under the deed is a sufficient possession of the mill; and the more so, as this was not an absolute conveyance."¹ So, where there is a tenancy from year to year, under a lease with covenant not to assign, and, in case of assignment, that the lessor may enter and hold possession, paying for improvements and buildings erected on the land; a mortgage thereof to the lessor is valid, though no possession be taken by him.² Kennedy, J., says:³—"The mortgagors had an interest in the premises mortgaged by them, equal to their value, and were regarded *quasi* the owners thereof. But the mortgagors had only a lease from year to year, which not only restrained them from assigning or letting their interest in the lots with-

¹ *Steward v. Lombe*, 1 Brod. & B. 596.

² *Luckenbach v. Breckenstein*, 5 W. & Serg. 145.

³ *Ib.* 149.

out the consent of the lessor, but likewise restrained them from removing or detaching the said buildings and improvements thereon upon any terms whatever. Actual possession could not have been delivered to the mortgagee without putting the latter also in the possession of the lots. But the mortgagors were restrained by the terms of their lease from doing this." So a mortgagee of four hundred tons of coal, part of a larger pile on the wharf of the mortgagor, took possession of the whole pile, with the assent of the mortgagor, and appointed the mortgagor his agent to sell his coal for him. Held, that there had been a sufficient delivery to vest the title in the mortgagee, and that he was entitled to hold the whole pile, against the assignee in insolvency of the mortgagor, until he had sufficient time and opportunity to separate and remove his four hundred tons.¹

39. But where machinery is not so attached to a building as to be a fixture, possession of the mortgagee is necessary to give a title, against an attaching creditor of the mortgagor. Thus there was a conveyance of land "having a wool-carding factory, and the appurtenances for carrying on the same;" and a mortgage back of the same premises to secure the purchase-money. About the same time, the mortgagor leased the premises to the mortgagee, but himself remained in possession. The machines stood on the floor of the building, not nailed to the floor, nor in any way attached or annexed, unless it was by the leather band, which passed over the wheel or pulley, so called, to give motion to the machines. This band might be slipped off the pulley by hand, and it was taken off and the machines removed from time to time, when they were repaired. Each machine was so heavy, as to require four men to move it on the floor, and was too large to be taken out at the door; but it was so constructed, as to be easily unscrewed and taken in pieces; and the machines were so taken in pieces, when removed by the sheriff, as hereafter stated. The day before the attachment, the mortgagee endeavored to secure the machines by nails or

¹ *Weld v. Cutler*, 2 Gray, 195.

spikes driven into the floor; and these were drawn out by the sheriff. In an action against the sheriff, for not keeping the machines, after attaching them as the property of the mortgagor: it was held, that they were thus liable to attachment, being personal estate, and never delivered to the mortgagee.¹ The Court say:² — “Though in some sense attached to the freehold, yet they could be easily disconnected, and were capable of being used in any other building erected for similar purposes. The relaxation of the ancient doctrine, respecting fixtures, has been in favor of tenants against landlords; but the principle is correct in every point of view; and it is to be considered, where they are removed from the realty by an officer, who takes them for the debt of the tenant, that they go substantially to his use. The mortgagees of the building and privilege, not being in possession, had no possession of the machines, which were therefore liable for the debts of the mortgagor.”

40. The question of fraud, arising from non-delivery of the property, is usually made between the mortgagee and a *subsequent purchaser* or *creditor* of the mortgagor, claiming under a sale from him, or attachment or execution against him. Other parties, however, may set up the same title, adverse to one claiming under a prior transfer without possession. Thus it is said:³ “A mortgagee is deemed a purchaser *sub modo*; he is so regarded every day under the statute respecting fraudulent sales (2 (N. Y.) R. S. 70, s. 5,) and protected within the saving clause in favor of subsequent purchasers in good faith.” So where a mortgage, embracing personal property, was given to secure certain debts due to the mortgagee, and liabilities assumed by him for the benefit of the mortgagor, and the mortgagee permitted the property to go into the possession of the mortgagor, with the understanding that he should appropriate it to the claims secured, and he in fact paid therewith as large a proportion of such claims, as could have been paid from the avails of the prop-

¹ Gale v. Ward, 14 Mass. 352.

² 4 Eng. l.

³ Per Nelson, C. J., Frisbee v. Thayer, 25 Wend. 399. See s. 3.

erty if it had been sold by the mortgagee; held, the mortgagee had not thereby lost his lien as against subsequent mortgagees, who took subject to the claims thus satisfied.¹ So the defendant, a pawnbroker, advanced money to a son of the mortgagor for the use of his family, and received plate, linens, &c., in pledge, which had been mortgaged to the plaintiffs, neglecting to make inquiry concerning the pawnor's authority, although there were circumstances to excite suspicion. Held, the mortgagees' title should prevail over the pledgee's.²

41. The statute of New York, requiring that mortgages be accompanied by possession, does not apply as between *mortgagee and landlord*; but in such case fraud in fact may be shown.³ Nelson, C. J., says: ⁴ — “Rent is a meritorious demand, and the law affords very ample remedies to enforce payment; but the landlord can set up no peculiar preference over other *bonâ fide* creditors, until he acquires an actual *lien* upon the goods.”

42. An *assignee in bankruptcy*, unless there be fraud, takes only the title which the bankrupt himself had, and cannot avail himself of the want of possession of a prior mortgagee.⁵ The same rule applies to assignees *in trust for creditors*. It is said,⁶ such assignees “have no rights which could not be set up by the creditors themselves, whom they represent. But the mortgagee is also a creditor of the mortgagors, and, as such, his claim is therefore equally meritorious with those of the other creditors. But the mortgage, which is a special assignment in his favor, made for the purpose of securing the payment of his debt, being executed anterior to the general assignment, gives to the defendant a prior right, in equity at least, if not in law, to whatever is contained in the mortgage.”

43. The *personal representative of the mortgagor*, after his

¹ Pond v. Clarke, 14 Conn. 334.

² Lewis v. Stevenson, 2 Hall, 63.

³ Frisbee v. Thayer, 25 Wend. 396.

⁴ Ib. 97.

⁵ Winsor v. McLellan, 2 Story, 500.

See Hilliard on Bankruptcy, &c. ch. 6, § 11.

⁶ Per Kennedy, J., Luckenbach v. Brickenstein, 5 W. & S. 149, 150.

death, cannot claim the property for want of delivery. Thus a bill of a female slave was made, with the following condition: "If said A. well and truly pay said B. the above sum, &c., before his death, the above obligation to be void; only the increase, if any, to remain the property of B." Held, this was a mortgage, and, if the mortgagor retained possession of the slave and her increase during his life, and died without payment, the mortgagee or his personal representatives might at law recover the slaves from the personal representatives of the mortgagor.¹ Ruffin, C. J., says: ² — "As the mortgagor had his whole life to pay the money, and had paid no part of it at his death, the mortgage became forfeited only on that event. We think that a mortgagee is not, under any circumstances, as between him and the mortgagor, obliged to take possession before a forfeiture, and thereby subject himself unnecessarily to an account. Whatever had occurred before the day of payment, the mortgagee might waive it, and upon the forfeiture of the mortgage by the non-payment of the money at the death of the debtor, a right to demand the mortgaged property thereby and then arose to the mortgagee."³

44. An assignee of the mortgagee may avail himself of the delivery made to the latter. Thus the owner of a horse mortgaged and delivered possession of it. Afterwards he assigned his remaining interest, and became the servant of the assignee, whom the mortgagee suffered to use the horse. The assignee and the mortgagor afterwards delivered the horse to another person to be depastured. Afterwards, on the 10th of July, the mortgagee conveyed his right to the four plaintiffs, and the same day the assignee of the mortgagor conveyed his right of redemption to three of them. July 13th, the horse was attached in the hands of the keeper, in a suit upon a note made by the mortgagor and his assignee, brought in the name of the payee, but by order and for the benefit of the owner of the note, the defendant in the present suit, and was sold on the execution in that suit,

¹ Joyner v. Vincent, 4 Dev. & B. 512.

² Ib. 520.

³ Ibid.

and purchased by the defendant. Soon after the attachment, the keeper of the horse was notified by a letter from the assignee of the mortgagor, that the horse was sold to the plaintiffs, and he was requested to deliver it to them, of which he informed the nominal plaintiff in that suit; but no such delivery was made. Held, the delivery to the mortgagee would avail his assignees, as against any one claiming through the assignee of the mortgagor.¹ (*g*)

45. Where, by the terms of a mortgage, the mortgagee, upon non-payment of the note at a certain time, is to sell the property, satisfy the debt, and pay over the balance to the mortgagor; and during this time the property, remaining in the mortgagor's hands, is attached as his by a creditor with notice, and sold on execution; in the absence of any provision as to the mortgagor's possession, it is held to be merely permissive, and the mortgagee may maintain trover, before maturity of the note.²

46. Where a mortgage of personal property contains no agreement that the mortgagor may remain in possession, the mortgagee may bring replevin before the debt falls due, although the former retained possession, and sold the property. Thus the following instrument was made to the plaintiff: "I, &c., do agree, &c., to *bill a sail* a yoke of oxen for to secure a payment of thirty dollars, to be paid the twenty-fifth of October. If not paid then, the oxen to be the said Pickard's; if paid at the time, the above instrument to be null and void." The mortgagor sold the oxen to the defend-

¹ Hunt v. Holton, 13 Pick. 216.

² Spriggs v. Camp, 2 Speers, 181.

(*g*) Held, the legal title was in all the plaintiffs, and the equitable right to redeem in three of them, no right remaining in the mortgagor's assignee; that the defendant could not claim as a *bonâ fide* execution purchaser, being presumed to know the facts which were known to the nominal judgment creditor; that the defendant was liable in trover, and, as the taking was wrongful, without previous demand; and that the defendant, being a stranger, claiming as a creditor of the mortgagor's assignee, could not object to the joinder in an action of the three plaintiffs with the fourth. Hunt v. Holton, 13 Pick. 216.

ant, and the plaintiff on the 10th of October replevied them. Held, the action might be maintained. Emery, J., says : — “ In respect to this personal property mortgaged, we do not perceive any such necessary implication (of the mortgagor’s possession). The words ‘ if not paid then the oxen to be the said Pickard’s,’ is only stating just what the law infers from the fact of a mortgage of goods and chattels as security for the payment of money at a certain time. The security of the mortgagee ought not to be diminished by the act of the mortgagor. Hardy had no right to sell this property, but subject to the plaintiff’s better right. He should have taken care that the note should have been paid at its maturity, if he would have defeated the plaintiff’s claim. But as it now is, the plaintiff’s right, it would seem, has become absolute. The plaintiff, on finding that the mortgagor had undertaken by a transfer to render it more difficult for him to follow his security, had a right immediately to replevy from the second purchaser, lest another alienation might follow, and he be still more distant from his remedy.”¹

¹ Pickard v. Low, 3 Shepl. 48, 50, 51, 52.

CHAPTER XLV.

DELIVERY AND POSSESSION. EFFECT OF A STIPULATION IN THE MORTGAGE THAT THE MORTGAGOR MAY RETAIN POSSESSION.

1. Absolute sale and mortgage compared, with respect to delivery. Express agreement in the mortgage for the mortgagor's continued possession.

2. Mortgage with an agreement that the mortgagor may *sell* or *consume* the property; whether fraudulent *per se*.

6. How far a mortgagor allowed to remain in possession has authority to *sell* the property.

7. Effect of an agreement for the mortgagor's possession upon the mortgagee's right to take or sue for the property.

1. As was suggested in the last chapter, a distinction has been sometimes made, with reference to the necessity of delivery, between absolute and conditional sales, upon the ground that a mortgage, from the very nature of the transaction, as a mere security, pre-supposes that the mortgagee is not to have actual possession until breach of condition. The general principle to be deduced from some of the cases would seem to have been, that, in case of *absolute* sales, the form of the instrument implies an immediate taking of possession by the vendee, and the law therefore requires some extrinsic explanation of his failure to do so, in order to make the sale valid against creditors; while a mere mortgage or conditional sale imports *primâ facie*, that the vendor may keep possession till breach of condition, and consequently his continued possession raises no presumption of fraud. This distinction, however, does not seem to be sustained by the weight of authority. It is distinctly and decisively repudiated by the more recent and binding decisions. But there is a class of cases where a similar principle is still applied. This is where the mortgage contains an express agreement that the mortgagor shall keep possession, or there is a lease from the mortgagee to him. As the possession of the mortgagor thereby becomes *consistent with the terms of the con-*

tract, it has been held, that such possession is not fraudulent against creditors. (a) The important element of fraud, a *secret trust*, is here wanting; and, so far as the validity of the transaction depends upon this consideration alone, the mortgage is sustained: though, as will be presently seen, a stipulation of this nature in the mortgage may be so framed, as not merely to be liable to the imputation and proof of fraud, but to render the instrument *per se*, on its face, fraudulent and void. (b) Thus a termor mortgaged

(a) The Court in Indiana recognize this distinction in the following language: — “The mortgagor retained the possession of the goods inconsistently with, and contrary to, the face of the mortgage, and such possession, unexplained by evidence, is of itself sufficient evidence of fraud as to creditors. No evidence was offered to explain that possession, and show that it was consistent with the mortgage; and it is, at least, doubtful, whether such evidence could have been received, if it had been offered. Such evidence would contradict the face of the mortgage; the mortgage being positive and direct that the mortgagor, at the time and place of making the mortgage, delivered the goods to the mortgagee to hold as his own, in his own right, subject to be redeemed, &c. We incline to think that such evidence could not be received under this mortgage, if it were offered. It is, however, wholly immaterial whether such evidence be received or not. The mortgagor not only kept possession of the goods, but he also used and treated them as his own; converted them to his own use; traded and trafficked on them as his own; sold them as his own, and converted the proceeds to his own use. These proceedings are not only contrary to the face of the mortgage, but are inconsistent with, and in direct opposition to, the intention, spirit, and meaning of it, and render it wholly fraudulent and void as to creditors.” Per Stevens, J., *Jordan v. Turner*, 3 Blackf. 314.

(b) As to the mortgagee's right of possession, see *Wheeler v. Nichols*, 32 Maine. 239; *Holmes v. Sprowl*, 31 Maine, 73. Whether parol evidence is competent to prove the mortgagor's right of continued possession, see *Case v. Winship*, 4 Blackf. 425; *Watson v. Williams*, Ib. 26; *Hankins v. Ingols*, Ib. 35. It is said “there is no foundation for the position, that by reason of” a surplus in the value of the property over the debt secured, the mortgagor is a *tenant in common* with the mortgagee. “The interest of the mortgagee is distinct, several, and paramount, and entitles him to possession in all cases, unless it is otherwise expressly agreed.” Per Weston, J., *Bartels v. Harris*, 4 Greenl. 153. In *Homes v. Crane*, 2 Pick. 610, Wilde, J., says: — “It makes no difference, we think, whether this agreement of the

his term for years, on condition that if he repaid the money a year after he should reënter; the mortgagee covenanting that he should take the profits till that time. The mortgagor did not pay, and the mortgagee allowed him to continue in possession and take the profits two or three years after; and in the interim judgment and execution were obtained against the mortgagor. Held, execution should not be made of this lease, for the mortgage should not be said to be fraudulent as to the creditor; and when a conveyance is not fraudulent at the time of making it, it shall never be said to be so for any matter *ex post facto*.¹ So, in *Stone v. Grubham*,² upon a bill of sale of chattels, being a lease for years, the vendor continued in possession; but, as the conveyance was only conditional upon payment of money, it was held, that the possession did not avoid the sale, as by the terms of the deed the vendee was not to have possession until he had performed the condition. So, in *Edwards v. Harben*,³ a very leading case upon this subject, it was admitted, that if want of possession is consistent with the terms of the deed, as it is in conditional sales, where the vendee is not to have possession till performance of the condition; the sale is valid. So in *Atkinson v. Maling*,⁴ a mortgage was made of a ship to secure an advance, and such further sums as should be advanced subsequently; with a clause, that until default the mortgagor might hold the ship and take the profits. Held, the mortgage was valid. So an assignment of the furniture and other personal property in a tavern, as security for a debt, with a proviso that the grantee should take possession on failure of payment of any instalment, sell the property, &c., till which time the vendor might keep possession, was held good against creditors.⁵ So a mortgagor of

¹ Lambert's case, Shep. Touch. 67.

⁴ Ibid. 462.

² 2 Bulstr. 225.

⁵ Martindale v. Booth, 3 B & Ad.

³ 2 T. R. 587.

505.

parties in respect to the possession appear on the face of the conveyance, or in a lease made at the same time, or be otherwise proved, unless, indeed, it were omitted in the conveyance for the purpose of concealment, or with some other fraudulent design."

goods, with a provision for possession till breach of condition, afterwards formed a partnership with another person, and put the goods into the partnership stock, and they were treated by both parties as partnership property. The mortgage being subsequently recorded and the partnership dissolved, the mortgagor transferred the goods to his partner in trust to pay the firm debts, and they were afterwards, before breach of condition of the mortgage, attached by partnership creditors. Held, the mortgagee still retained his title, and might legally require payment of his debt from the officer.¹ So a debtor, "in consideration of indebtedness," conveyed to his creditor certain property by a written instrument containing this clause; "and it is agreed that the debtor shall remain in possession, till default of payment of what may be due to" (the plaintiff), "at such time as he shall demand payment." The property was subsequently delivered, and the sale proved *bonâ fide*. Held, the property passed, as against creditors of the vendor, and might be held as security for subsequent liabilities on his account. It was said, that the vendee might be summoned as trustee of the vendor, which would prevent any claim for advances, made after service of the writ upon him.²

2. As has been already suggested, there is a class of cases, where a stipulation in the mortgage itself for the mortgagor's continued possession renders the mortgage fraudulent and void. These are generally mortgages of *stocks in trade*, with a provision that the mortgagor may not only continue in possession, but proceed, as before, with his business; or of *perishable* or *consumable* articles, which the mortgagor is allowed to *use* as well as *retain*; (c) ordinarily, in both in-

¹ Alden v. Lincoln, 13 Met. 204.

² Adams v. Wheeler, 10 Pick. 199.

(c) Where property mortgaged exceeds greatly in value the amount of the debt, and embraces perishable articles, these facts are held to afford presumptions of fraud, which may, however, be explained. Crosby v. Huston, 1 Tex. 203.

So the conveyance of property by deed of trust, which is consumable in

stances, with the further proviso, that the particular articles disposed of by the mortgagor shall be replaced by others of like kind and value. The decisions upon this branch of the subject are somewhat variable and contradictory.

3. In Pennsylvania, some cases of this description have arisen, where the grounds assumed and the language used by the Court would seem to imply, that the fact of the mortgagor's possession being *consistent with the mortgage* does not in any case divest it of a fraudulent character; but that delivery is as necessary in case of mortgage as of absolute sale, under the statutes of 13 & 27 Eliz., even though the deed expressly provide that possession may be retained; and, if the mortgagor retain possession, the mortgage is *per se* fraudulent, and void against a subsequent *bonâ fide* purchaser. Appearances must not only agree with the real state of things, but the real state of things must be honest and consistent with public policy.¹ Thus a mortgage was given, to secure two creditors, of the bark and tools in the tan-yard of the mortgagor, a tanner, of his skins and leather unfinished in bark and vats for tanning; providing that he should continue in possession, for the purpose of working, tanning, and finishing the same. The mortgage was not recorded, and the property remained in possession of the mortgagor, and he continued to work the leather in tanning, and to use the tools and bark for that purpose. There was no symbolical delivery, nor any schedule, inventory or appraisement. Held, fraudulent *per se*, as against a *bonâ fide* creditor without notice.² Gibson, J., says:³ — "It is said, whenever, by the terms of the contract, it appears possession was not to follow immediately, the case is not within the purview of the

¹ See *Welsh v. Bekey*, 1 Penn. 57;
Milne v. Henry, 40 Penn. 352.

² *Clow v. Woods*, 5 S. & R. 275.
³ *Ib.* 279.

the use, is not fraudulent in itself, unless it be stipulated in the deed that the grantor may use it. In the absence of such stipulation, the conveyance is only *primâ facie* fraudulent, and the fact of fraud is for the determination of a Jury. *Ewing v. Cargill*, 13 S. & M. 79.

statute (of 13 Eliz.). This, I apprehend, must be taken with great qualification. The contract, and the evidence of it, are secret matters between the parties themselves, and can afford no notice to creditors. What will it avail, then, that a person intending to cover his property by a sham sale, has it expressed in the contract that he is to retain indefinite possession. Such a conveyance would bear the stamp of dishonesty on its front. I take it to be necessary, not only that retention of possession be part of the contract, but that it also appear to be for a purpose, fair, honest, and absolutely necessary; or, at least, essentially conducive to some fair object the parties had in view, and which constituted the motive for entering into the contract.” (d) In another case, Hayden assigned to Welsh the moiety of a crop growing on the farm where he resided, and the moiety of another crop on the farm where his tenant resided, to remain bound for the repayment of two hundred dollars; and it was stipulated that “Hayden shall take care of the crop while growing, cut, thrash, and carry it away, under the direction and control of Welsh, who is to have his money out of the price of it.” There was no delivery of possession, or of any *indicia* of ownership. Held, the mortgage was fraudulent and void against creditors; and the mortgagee had no prior claim over other creditors to the proceeds of the property, after the death of the mortgagor.¹ Gibson, C. J., says:² — “The argument that the assignment is of a rent in the nature of a chose in action, is without force, granting the fact to be so; because the assignment of a chose in action itself is subject to the rule which requires a transfer of the possession. Did the

¹ Welsh v. Bekey, 1 Penn. 57.

² Ib. 61.

(d) Judge Gibson remarks upon two prior cases on this subject: — “Meggot v. Mills, 1 Ld. Raym. 286, is a case wholly irreconcilable with principle, and, I apprehend, not law.” (5 S. & R. 280.) “In Barrow v. Paxton, 5 Johns. 258, the judgment of the Court may have been right; but the reason given for the decision is an unsound one.” Ibid.

parties leave undone that which might serve to indicate the actual owner? Instead of substituting the mortgagee for the mortgagor, and providing for a transfer of the possession as soon as it might be delivered, consistently with the bargain with the cropper, it was expressly stipulated that the mortgagor should retain the crop till it should be sold by the direction of the mortgagee, who was to have possession of nothing but the proceeds of it. Taking care of grain, growing, reaping, thrashing, and selling it, include all the notorious acts of ownership that are ordinarily exercised in relation to this species of property; while the act of giving directions is a matter usually known only to the parties. In reply to the argument that the contract, although fraudulent as to third persons, is good between the parties, it is proper to remark that the contest with the executor is virtually a contest with the creditors, it being expressly made a part of the case that the estate is insolvent." So, in case of a mortgage of a country stock of goods, the mortgagor was entitled to retain possession till default in payment. A portion of the debt was payable in goods from the store as the mortgagee might call for them. It also appeared, on the face of the mortgage, that the mortgagor had hired from the mortgagee the store where the goods were kept for three years, and the mortgagor agreed in the same instrument to keep on hand a full assortment of goods, groceries, &c. It appeared in evidence, that the mortgagor and mortgagee were respectively country merchants in one village; that the latter sold to the former his stock, and took the mortgage for the price on all the goods in both stores; that upon making the purchase the mortgagor removed his former stock to the store which the mortgagee had occupied, and went on doing business with both stocks. A verdict having been rendered in favor of the mortgagee, the judgment was reversed.¹ A similar doctrine has been held in Massachusetts. Thus a mortgage was made of "all the hay, grain, and produce, growing" on the mortgagor's

¹ *Griswold v. Sheldon*, 4 Comst. 580.

farm, to secure payment of a certain sum in one year, but mentioning no personal security. The produce was used by the mortgagor, at pleasure, with the knowledge of, and without objection from, the mortgagee. Held, a Jury were bound to infer from these facts, that the mortgage was fraudulent against creditors.¹ Wilde, J., says:²—“The defendant’s counsel contends, that this property was in its nature subject to be consumed in its use, and was intended to be so consumed by the mortgagor; and that the mortgage of it, therefore, is *primâ facie* colorable and fraudulent against his creditors. And this inference is fully sustained by the decision in *Somerville v. Horton*, 4 Yerg. 541, the principle of which decision seems to be admitted as correct, by Morton, J., in delivering the opinion of the Court in *Shurtleff v. Willard*, 19 Pick. 212. The principle, however, on which such a fraudulent intent is to be inferred, must be understood with some limitations. Articles, in their nature subject to be consumed in their use, may be mortgaged without any imputation of fraud, provided they are not to be used, and may be kept without damage until the mortgage debt shall become payable. But if the articles mortgaged are perishable, and cannot be so kept, or if they are mortgaged under an agreement or understanding that they may be used and consumed by the mortgagor, (as the understanding of the parties seems to have been in the present case,) then we think the transaction must be considered as collusive and fraudulent. No other reasonable inference from the conduct of the parties to the mortgage can be made. The mortgagor used and consumed the property in the same manner as he would have done if no mortgage had been made; and this with the knowledge of the mortgagee, and without objection on his part. The conduct of the parties is inconsistent with the object of a mortgage, which is to secure the creditor.”

4. So, in *New York*, A. bought of B. a stock of goods in B.’s store, and gave notes for the price, payable monthly, and

¹ *Robbins v. Parker*, 3 Met. 117.

² *Ib.* 119.

secured by a mortgage of the stock, which provided that, upon non-payment, or any attempt by the mortgagor or any other person to remove, secrete, or sell the goods, the mortgagee might take possession. A schedule was annexed, closing as follows: "together with all other articles mentioned, &c., in a bill of sale this day executed by" B. to A.; "and to include also all other articles of a like nature, which may be put, or which may be in said store whenever" B. "may be entitled to enforce the within mortgage." A. "not to sell any of the said goods upon credit. If any of the said goods are sold upon credit, that shall be sufficient cause of forfeiture of the within mortgage, and entitle" B. "to treat the same accordingly at his election." A. took possession, and continued in business over a year, when the goods were levied upon by his creditors. Held, as a matter of law, upon the face of the papers, connecting the mortgage and schedule together, the provision that A. might sell at pleasure, without applying the proceeds to the mortgage or any other debt, rendered the transaction illegal and void.¹

5. There are some cases, however, where the rule above stated has not been so strictly applied. Thus, in reference to a stipulation in the mortgage, that the mortgagor might *use* the property, which was in its nature perishable, Lord Denman, C. J., says: ²— "The only word that raises a doubt is, 'make use of;' for that, applied to perishable articles, must mean *consume*. But the most that can be made of it is, that the stipulation in question may amount to a license to consume such articles; they are still conveyed to the plaintiff; there are no words defeating the original grant, nor any power of selling and disposing of them, or dealing with them generally as if they had not been conveyed." So, where a bill of sale of goods was given by way of security or pledge for money lent, and a trust in the vendor to keep the goods, and sell them for the benefit of the vendee, appeared on the face of the deed; it was held not fraudulent.³ So, in Mas-

¹ Edgell v. Hart, 13 Barb. 380.

³ Bucknal v. Roiston, Prec. in Cha.

² Gale v. Burnell, 7 Ad. & Ell. (N.) 285.

sachusetts, a trader made a mortgage of his stock, providing that, till breach of condition, he might retain and use the whole of it, without hindrance or interruption. It was also verbally agreed between the parties, that he might sell and dispose of it, and apply the proceeds to his own use, with a promise on his part, in case he should make large sales, to increase the mortgagee's security by other property. Held, such mortgage was not *per se* fraudulent, but the presumption of fraud arising from its terms might be rebutted; and the Court, upon the facts above stated, would hold the mortgage to be a valid one.¹ Wilde, J., says,² after referring to the doctrine, as established by late cases, that the mortgagor's continued possession is not *conclusive* evidence of fraud:—
“ We consider the agreement as to the mortgagor's continuing in possession of the goods mortgaged, after the mortgage, and the permission to sell a part of the property, and to apply the proceeds to the mortgagor's own use, as evidence of the same character, and as tending to raise the same presumption; the one part of the agreement may raise a stronger presumption of fraud than the other, but this is a difference only in the weight of the evidence. It has been argued, that the necessary consequence of the agreement was to deceive and defraud the creditors; and that a party must always be presumed to have intended that which necessarily must follow from his act. But it was not a necessary consequence of the agreement that creditors would be defrauded; and even if that were the necessary consequence of the agreement, it would not follow that such a presumption might not be rebutted.” And, in the same State, a mortgage of a stock in trade, allowing the mortgagor to trade with, sell, and dispose of some of the articles, provided he forthwith purchase and place in his store others of like kind and value, and apply the sales thereof to the mortgage debt, was held not *per se* fraudulent.³ The Court consider the question raised in this case as substantially decided in *Briggs v. Park-*

¹ *Briggs v. Parkman*, 2 Met. 258.

² *Ib.* 264.

³ *Jones v. Huggefords*, 3 Met. 515.

man, (2 Met. 258); that case being liable to the same objections, and also to the further one, that the agreement for the mortgagee's disposing of the property was a secret one, and therefore more objectionable than if recited in the mortgage itself. So, in Michigan, a mortgage of a stock of goods, which leaves the mortgagor in possession, and by inference authorizes him to sell in the usual course of business, is good between the parties, and not necessarily fraudulent as to creditors. Being good between the parties, such a mortgage could not be fraudulent on its face against creditors, since it would not show that there were any creditors, or, if it did, it would not appear but that they had assented to it, or were themselves sufficiently secured.¹ So it is held in Maine, that a mortgage may lawfully contain the agreement, that the mortgagor shall retain possession till breach of condition, and pay over the proceeds of all sales, to be applied to the mortgage debt.² Weston, C. J., says: ³—“ They authorized sales, and they secured to themselves the power to control the proceeds for the same purposes for which the goods were mortgaged. The proceeds were purchased with their property, through his agency, under their authority. They represented the goods, were substituted for them, and, by the contract, were equally subject to their control. It was manifestly the intention of the parties that the proceeds should be subject to their lien. If he sold for cash, the money was theirs, so long as it could be identified. And if, with the money received, he purchased other property, the property so purchased was theirs, until he extinguished their right by fulfilling the condition. So if he exchanged the goods mortgaged for other goods, and they chose to ratify it, the goods received in exchange were equally subject to their lien. This course of proceeding was not calculated to injure other creditors. The debtor's right to redeem was all which could be made available for their benefit, under the statute of 1835, c. 188. And the remedy there provided would apply as well

¹ Gay v. Bidwell, 7 Mich. 519.

³ Abbott v. Goodwin, 7 Shepl. 411.

² Abbott v. Goodwin, 7 Shepl. 407. See Blood v. Palmer, 2 Fairf. 414.

to the substituted goods, as to those originally mortgaged. Nor would the mortgagor obtain credit by the possession of the one, any more than by the possession of the other."

6. The question has been raised, how far *an authority to sell* the mortgaged property may be implied from the mortgagor's continued possession. Thus a mortgage was given of "a machine-shop and the steam-engine, boilers, and all other tools, stock, and property of every name and description in said machine-shop." The mortgage was duly recorded, and the mortgagor, continuing in possession, and still carrying on the business, sold one of the engines. Held, the purchaser acquired no title against the mortgagee, unless the latter had expressly or impliedly authorized the sale; that such authority, in the absence of fraud, depended on the intent of the parties; that this intent might be inferred from the above facts, but was a question for the Jury; and that the Court could not rightly instruct the Jury, that, if they found the facts, they were bound, in the absence of contradictory evidence, to find the authority.¹ Green, C. J., remarks:² — "Embarrassing questions may arise under this registry law, where the sale is made by the mortgagor, left in possession of the mortgaged property by the mortgagee. To uphold the sale, there must be some agency or authority in the mortgagor from the mortgagee, express or implied. If the possession be continued with the mortgagor for the purpose of sale, then the mortgagee ought to be bound; but if the possession be for use merely, then the mortgagee would not be bound. The object of the statute is to compel the mortgagee to take possession of the mortgaged property, or put his mortgage on record, and thus give authentic notice of its existence. The mere possession of the mortgagor is no evidence of authority to sell; such a construction would defeat the security of the mortgagee. The statute contemplates a possession by the mortgagor, and protects a purchaser by requiring a record of the mortgage. But if the property is left in the possession of the mortgagor for the

¹ Jenckes v. Goffe, 1 Rhode Island, 511.

² Ib. 517, 518.

purposes of sale, then the mortgagor is the agent of the mortgagee for that purpose. In the absence of fraud, the effect of the possession depends on the intent of the parties; that intent is a question of fact. It may be inferred from circumstances such as are relied upon in the present case, but such inference is to be drawn by the Jury, and the Court ought not to instruct the Jury that, if they find the circumstances, they are bound, in the absence of contradictory testimony, to find the authority and intent. If the mortgagee should knowingly permit the mortgagor to hold out delusive appearances of authority to sell, and thereby deceive a *bonâ fide* purchaser, he would be bound."

7. With regard to the rights of the mortgagee over the property, where it is stipulated that the mortgagor may retain possession; it is held, that a mortgagee of chattels is the true owner, and entitled to actual possession and control of them, upon non-payment of the debt. His title is not affected by any agreement as to the temporary possession.¹ So it is held, that the mortgagor of a chattel, having the right of possession for a certain period, or a purchaser from him, cannot after its expiration dispute the title of the mortgagee.² So, where it is stipulated that the mortgagor may retain possession till breach of condition; the mortgagee may take possession when either of the claims falls due.³ So, in case of a mortgage of goods, to secure a note payable on demand, the mortgagor to have possession till breach of condition; no demand of payment having been made, and the property being attached by a creditor of the mortgagor, and payment demanded of the officer, according to the statute, and not made within twenty-four hours: held, the mortgagee had become entitled to immediate possession, and might maintain trover against the officer.⁴ So, in case of a mortgage, specifying no time of payment, and providing that until default the mortgagor might retain possession, the property being taken on execution against the mortgagor, the mort-

¹ Hall v. Snowhill, 2 Green, 8.

² Holmes v. Hall, 3 Dev. 98.

³ Burton v. Tannehill, 6 Blackf. 470.

⁴ Alden v. Lincoln, 13 Met. 204.

gagee brings replevin. Held, the debt being due immediately, not on demand, an absolute legal title vested in the plaintiff, without demand; and the mortgagor was a naked bailee.¹ So a conveyance of goods was made by deed, dated in September, 1845, subject to a proviso, that if the grantor should pay to the grantee the sum secured, upon March 22, 1850, or any earlier day, after receiving from the grantee fourteen days' notice, and should in the mean time pay the interest half-yearly, the conveyance should be void. It was further agreed in the deed, that till default in payment of principal or interest as above provided, the grantor, his executors, &c., should be allowed to hold and enjoy the goods. No notice was given for earlier payment according to the deed, nor for payment of interest. The grantor remained in possession till December, 1849, when he became bankrupt, and the defendants, his assignees, took possession of the goods, and sold them in February, 1850, the grantee having previously transferred them to the plaintiffs. Held, though the grantor had the right of possession till March, 1850, defeasible by non-payment of the principal and interest, as provided; yet the sale of the goods before that day put an end to the term, and the assignees had been guilty of a conversion, for which the plaintiffs might maintain trover against them.² Parke, B., says: ³ — "The effect of the agreement of the parties in this case was to give not a mere possession and use of the goods to Malpas as bailee, but the right of possession and use for the term ending the 22d of March, 1850, defeasible by non-payment, &c. The duration of the time of holding was not uncertain, as it would have been if it had been only until such notice had been given; in that case it might have been a term for life. But it has a certain limit which it cannot exceed. It is therefore good as a grant of a term defeasible. It is too late to contend that the provision as to possession is a mere covenant. If, therefore, these goods had been simply taken

¹ *Howland v. Willett*, 3 Sandf. 607.

² *Fenn v. Bittleston*, 8 Eng. R. 483.

³ *Ibid.* 485, 486.

by a third person out of Malpas's custody during the term stipulated for, no action of trover could have been maintained, because the plaintiffs would have had no present right to the possession." But he proceeds further to decide, that the bailment was terminated by the act of the assignees, whose act for that purpose was the same as that of the grantor himself, in selling the goods absolutely before March, 1850, and thus preventing their return at the end of the term; and that such sale was itself a conversion. So, where it is agreed that the mortgagor shall retain possession till the debt falls due, and then, or if the mortgagor attempt to remove or dispose of the property, that the mortgagee may take and sell it; if the mortgagor remove the property out of the county, the mortgagee may replevy it, though the debt be not due. The possession of the mortgagor, in such case, does not avoid the mortgage, if it be duly filed.¹ So, where a mortgage is made and duly recorded, under which the mortgagee has the right of immediate possession, but he is induced, by false and fraudulent representations of the mortgagor, to allow the goods to remain in the possession of the latter for a certain period; and during this period the mortgagor, for the purpose of cheating and defrauding the mortgagee, sends them to an auctioneer, by whom they are sold, and the proceeds paid over to the mortgagor: the mortgagee may maintain trover against the auctioneer, though he was no party to the fraud, and had no knowledge of the mortgage.²

8. But where a mortgage provided, that, "if the mortgagee should at any time deem himself in danger of losing his debt by delaying the collection of it until the expiration of the time limited for the payment, he might take possession;" held, the mortgagee was not so far in constructive possession as to maintain trespass, unless the contingency had happened upon which his right of possession depended, and had been followed by some act in assertion of the right.³

¹ *Russell v. Butterfield*, 21 Wend. 300.

³ *Skiff v. Solace*, 23 Verm. 279; acc. *Woodward v. Gates*, 9 Verm. 358.

² *Coles v. Clark*, 3 Cush. 399.

CHAPTER XLVI.

REGISTRATION OF MORTGAGES.

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| <p>1. General object of registration.</p> <p>2. Unnecessary between the parties, &c.</p> <p>3. A substitute for delivery; effect of the mortgagor's continued possession, after registration.</p> <p>7. What constitutes a mortgage, requiring registration; form of the instrument and nature of the property.</p> <p>13. Whether registration is neces-</p> | <p>sary as against parties having notice; what kind and amount of information is sufficient to constitute notice.</p> <p>27. Place of registration; removal of the mortgagor from one State or town to another.</p> <p>43. Mode or form of registration.</p> <p>64. Certificate of registration; its effect.</p> |
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1. To obviate the inconvenience arising from a change of possession in mortgages of personal property, and at the same time protect creditors and purchasers from the imposition which might be practised upon them, by persons appearing to be the absolute owners of goods which are really subject to incumbrance; it is now generally provided by the statutes of the several States, (a) that such mortgages, like those of real estate, shall be publicly *registered* or *recorded*, in order to give them validity against any one but the parties themselves; unless the mortgagee take and retain possession of the property; in which case registration is dispensed with, because the purpose of it, notice of the incumbrance, is accomplished in another way. (b) Statutes of this nature must, in general, be strictly complied with.¹

¹ Hill v. Gilman, 39 N. H. 88; Ely v. Carnley, 3 E. D. Smith, 489.

(a) See Appendix.

(b) It seems, under a statute making mortgages of personal property valid, if recorded, notwithstanding the possession of the mortgagor, a registry made before the passage of the act is sufficient. Fowler v. Merrill, 11

2. A mortgage, though not on file as required by statute, is not void against a wrong-doer, but only as against creditors.¹ It is also good between the parties.² So delay in recording does not affect its validity between the parties, but only as against an intervening purchaser in good faith, or a creditor.³ But an assignee in insolvency holds against an unrecorded mortgage without possession. He does not come within a statutory exception of *parties*.⁴

3. In general, registration is *a substitute for delivery*, and a mortgage duly recorded is valid against all the world, though the mortgagor retain possession as before; whether it be a first or second mortgage.⁵ Thus it is said in Massachusetts: "By Stat. 1832, c. 157, the registration of a mortgage of personal property is substituted for delivery of possession. And a mortgage duly executed and recorded, is

¹ *Moses v. Walker*, 2 Hilt. 536.

² *Merrick v. Avery*, 14 Ark. 370.

³ *Westcott v. Gunn*, 4 Duer, 107.

⁴ *Brigham v. Jordan*, 1 Allen, 373,

(where the cases as to notice are commented on.) See Gen. Sts. c. 151, § 1.

⁵ *Smith v. Smith*, 11 Shepl. 555;

Donaldson v. Johnson, 2 Chand. 160.

How. U. S. 375. Upon the general subject, see *Spencer v. Amis*, 12 La. An. 127; *Dillingham v. Ladue*, 35 Barb. 38; *Sweet v. Lawrence*, Ib. 337; *Troy v. Smith*, 33 Ala. 469. A title under a recorded mortgage is better than one under an execution issued after the registration. *Troy v. Smith*, 33 Ala. 469.

Goods were mortgaged, under (Ind.) Rev. Sts. 1843, with a stipulation in the mortgage, that, until condition broken, the mortgagor should retain possession. After delivery of the mortgage, the goods were levied on as the mortgagor's. During the continuance of the levy, condition was broken. The mortgagee brought his action against the sheriff, (after ten days from the execution of the mortgage,) to try the right of property. Held, he must show that the mortgage had been recorded within ten days after its execution. *Chenyworth v. Daily*, 7 Ind. 284.

Independently of statute, valid mortgages do not need to be recorded; but may be, at the pleasure of the mortgagees. Such recording is legal, and, while it does not operate as constructive notice to creditors and purchasers, it tends to give publicity and repel fraud, and would make a sale valid, if *bonâ fide* and on good consideration, except against subsequent purchasers without notice. *Merrill v. Dawson*, 1 Hemp. 563.

effectual to pass the property described in it, without any other act or ceremony. And whether the mortgaged goods continue to be holden under the mortgage or become absolutely the property of the mortgagee, the possession of the mortgagor can at most be but evidence of fraud.”¹ So in another case it is said: “It seems to have been the intent of this statute to enable the owners of personal property to make a valid transfer, by way of mortgage or conditional sale, to stand as a security, and of course available against third persons, as well as against the mortgagors and their heirs, and yet to enable such mortgagors to have the possession and use of the goods until condition broken. For this purpose registration is required as giving equal and perhaps greater notoriety to the transaction, than delivery and retaining possession. There would seem to be little value in a mere formal or symbolical delivery, which may be in presence of a single witness, in a manner comparatively secret, when it is to be followed by no change of possession to give actual notoriety to the transfer. This opinion goes no further than to hold, that no formal, symbolical, or constructive delivery of the mortgaged property is necessary, where the execution, delivery, and registration of the instrument of conveyance are duly proved, and where good faith in the transaction, adequate consideration, and other requisites of a valid mortgage of personal property, are shown.”² Accordingly, a mortgage so describing the property that it can be identified is valid against creditors, if duly recorded, without any delivery, actual or constructive;³ although, it seems, registration is not sufficient, where the property still remains to be measured, weighed, counted, or otherwise separated from a larger bulk.⁴

1. And, upon the same principle, where a mortgage was duly recorded, and the mortgagee entitled to immediate possession, and the mortgagor by false and fraudulent representa-

¹ Per Morton, J., *Shurtleff v. Willard*, 19 Pick., 211.

² Per Shaw, C. J., *Bullock v. Williams*, 16 Pick. 34.

³ *Ib.* 33.

⁴ *Forbes v. Parker*, *Ib.* 462.

tions induced the mortgagee to allow him to retain possession for a certain period, and, for the purpose of defrauding the mortgagee, sent the goods to an auctioneer, by whom they were sold and the proceeds paid over to the mortgagor, without notice of the mortgage, or any participation in the fraud; held, the mortgagee might maintain *trover* against the auctioneer.¹ Shaw, C. J., says: ² — “Some things must be considered as settled in the law respecting the mortgage of personal property; and although the law, as it stands, may be supposed to operate as a temptation to parties to commit frauds, and to enable them to do so successfully, yet the danger of fraud is intrinsic and incident to the nature of the subject, and the remedy, if any can be devised, is for the legislature; and the law must have its effect, although it may sometimes lead to hard cases affecting individuals. We must take it as settled, that a mortgage of a chattel vests a property in the mortgagee; not an absolute title, indeed, but a present title, defeasible upon a condition subsequent. An actual delivery and change of possession is not necessary to perfect the mortgagee’s title, if the mortgage is duly recorded; the registration of the mortgage supersedes the necessity of an actual delivery, and gives all parties concerned constructive notice of its execution and existence. It seems to follow, as a necessary consequence, that goods mortgaged may be safely left by the mortgagee in the custody of the mortgagor, without the former’s being chargeable with *laches*. Indeed, the most common object of such a mortgage is to enable the mortgagor to give security on the goods, and yet for the time being to retain the custody and use of them. Another consequence of this relation is, that, as a general rule, the right of possession follows the right of property; and therefore, where there is no restraining stipulation, the mortgagee having the right of property, until defeated by the performance of the condition, has as incident thereto the right of possession, and may therefore take the goods into his own custody or maintain trespass or *trover* for them,

¹ *Coles v. Clark*, 3 Cush. 399.² *Ib.* 401-403.

against any one who takes or converts them to his own use. The conduct of the mortgagor was unlawful; she had no title in herself which she could transfer to another by a sale; and she had no authority to transfer the title of the mortgagee. The sale and disposition of the goods, the delivery of them and receiving the proceeds, by order and direction of the mortgagor, who had neither title nor power, was a conversion. The plaintiff had a qualified property and right of possession by virtue of his mortgage, of which the registration was constructive, legal notice. The sale and disposal of the goods by the defendants was in law a conversion, without knowledge or suspicion of the fraudulent purpose."

5. In New York, a change of possession is unnecessary, where the mortgage is duly recorded.¹ But if the mortgage be not filed, there must be an actual change of possession. And if the mortgagor is allowed to retain possession, and manage the property as agent, the mortgage is fraudulent and void against creditors.² Thus, in trespass for a wagon, the plaintiff claimed title under a mortgage covering a large amount of personal property, including the wagon. The mortgage had not been filed, pursuant to Revised Statutes 71, sections 9 and 10. At the time of executing the mortgage, the mortgagor made a formal delivery to the plaintiff, going around with him and pointing out the several articles. The plaintiff then requested him to take charge of the property at a stipulated compensation, and manage it as agent. He accordingly took immediate possession, and had not possessed the property since, except as the plaintiff's agent. The property was not removed, but had ever since remained in charge of the mortgagor. Held, the mortgage was void against creditors of the mortgagor.³ Cowen, J., says:⁴—
"The plaintiff's title to the one-horse wagon depended on the question, whether the possession of the property, of which he took a mortgage, was *actually* delivered, within the mean-

¹ Lee v. Huntoon, 1 Hoffm. Ch. 448.

² Camp v. Camp, 2 Hill, 628.

³ Ibid.

⁴ Ib. 629.

ing of the statute for the protection of creditors against fraudulent transfers. The mortgage was not filed, and the statute declares such a mortgage absolutely void as to creditors, if it be not accompanied by an *actual* and continued change of possession. *Actual change of possession*, imports at least something more than a mere legal or fictitious change, to be worked by the operation of the mortgage itself. Upon any other construction the statute means nothing. Nor can parties agree that the mortgagor shall continue in *actual* possession, and call this the possession of the mortgagee."

6. But, in Maine, goods subject to mortgage being attached, and the bailee of the officer, while the latter had custody of them, having consented to hold them as servant of the mortgagee, and actually held them for him; held, although the property was worth more than thirty dollars, the above facts showed such a delivery and retaining of possession as to dispense with the necessity of registration.¹

7. It is held that an instrument, in purpose and effect constituting a mortgage, but not drawn in the usual form of such a transfer, comes within the statutory requirement of registration. Thus, in Virginia, an absolute bill of sale, intended as a mortgage, of a runaway slave, was made, but not recorded, and no possession delivered. The seller afterwards got possession of the slave, and sold him to a *bonâ fide* purchaser, without notice, for valuable consideration. Held, the conveyance was a mortgage, and invalid because not recorded.² Tucker, J., says:³—"Can it be, then, that the falsehood of the conveyance places the plaintiff in a better situation, than if the deed had been draughted according to the *truth* of the case? Every well received maxim must be overturned before it can be so; suppression must become a merit, and falsehood a virtue; and a guilty party must be permitted to take advantage of his own wrong. It is a transaction calculated to work a double fraud, to deceive

¹ Wheeler v. Nichols, 32 Maine, 233.

² Bird v. Wilkinson, 4 Leigh, 266.

³ Ib. 274.

a double set of creditors and purchasers; creditors and purchasers both of the grantor and grantee." So, in Kentucky, the defeasance of an absolute bill of sale must be recorded with mortgages, though the property has been delivered.¹ So, on the other hand, under a law in North Carolina, requiring the registry of mortgages of chattels, and providing that without such registry they should be invalid against creditors or purchasers for valuable consideration, a deed absolute in form, but accompanied by a parol agreement for redemption, was held in law fraudulent and void against creditors, notwithstanding a registration under the statute. The object of registration was said to be, to give notice of the existence and extent of incumbrances, as mortgages; and the true character of the deed must appear on the record, to give it protection.²

8. But in Mississippi, an absolute bill of sale of slaves, accompanied by delivery, though intended by the parties as a mortgage, need not be recorded to make it effectual against subsequent judgment creditors.³ (c) Sharkey, C. J., distinguishes the case from that of *Dey v. Dunham*, 2 John. Ch. 182, in which it was held that a subsequent defeasance of an absolute deed must be recorded, in order to render the mortgage valid against third persons. "But here there was nothing to record. It is an equitable mortgage, an absolute

¹ *Lobban v. Garnett*, 9 Dana, 389.

³ *Humphries v. Bartee*, 10 Sm. & M.

² *Gregory v. Perkins*, 4 Dev. 50; 282.

Dakes v. Jones, 6 Jones, 14. See 2 Kent, 526, note.

(c) In such case, equity will decree a sale, and, after discharging the claim of the purchaser, apply the proceeds to the judgments, or allow the purchaser to redeem the mortgages. *Humphries v. Bartee*, 10 Sm. & M. 282.

The statute of Alabama, in relation to the registration of mortgages and deeds of trust, (*Hutchinson's Code*, 605, 606,) does not apply to a written agreement, by which a planter assigns his crop of cotton to his commission merchant, to secure the latter for advances previously made on it, with a stipulation that the cotton shall not be sold before a specified day, unless directed by the assignor. *Bryan v. Smith*, 22 Ala. 534.

instrument, which equity converts into a mortgage, and equity will not so convert it to the prejudice of the grantee. A bill of sale need not be recorded, and any parol agreement in relation to it cannot be. In the case cited from 2 Johnson, the possession probably remained with the grantor. Bartee took possession of the negroes, and no other conveyance was necessary to pass title. This was equivalent to notice."¹

9. And a statute requiring registration of mortgages does not apply to a mere *lien*. Thus, in *trover* for 500 mill-logs, it appeared that the plaintiff and one Hildreth contracted as follows: "The said Sawyer has sold, or agreed to sell said Hildreth, a certain set of mill-logs, cut by the said Sawyer the past winter on, &c. For which said Hildreth has given said Sawyer notes of hand as follows, viz., &c. Said Sawyer shall retain and hold a full and perfect lien on said logs and lumber manufactured therefrom, as collateral security for the aforesaid notes, and said Sawyer has, or will turn the logs out of the lake free of expense to said Hildreth, and said Hildreth is to pay all expenses below the lake." The notes were unpaid. Some of the logs had been floated down the river to market, and the defendant had purchased 199 from Hildreth, and converted them to his own use. Held, the action was maintainable.² Shepley, J., says: ³ — "The question is, whether the property passed absolutely, so that a purchaser, who had no notice, could hold as against the plaintiff. It was not the purpose of the parties, that the plaintiff should fully part with his property till payment. The title was intended to pass, subject to incumbrance, subject to 'a full and perfect lien.' That intent is to prevail, if the rules of law will permit. When the common law *itself* raises a lien, possession must be continued. The law, though it raises the lien, does not continue it. But that law does not prohibit parties from making a lien by contract, and stipulating the mode of retaining it and of rescinding it. It

¹ *Humphries v. Bartee*, 10 Sm. & M. 297.

² *Sawyer v. Fisher*, 32 Maine, 28.

³ *Ib.* 30.

is contended, however, that this contract was a mortgage, and that it is void by the statute, because not recorded. The statute does not embrace liens. If this view exposes innocent purchasers to loss, it is but like various other laws. If the law of *caveat emptor* be unsuitable, it is for the legislature alone to alter it."

10. In Alabama, an Act of January, 1828, provided, that *all deeds and conveyances of personal property, in trust*, to secure any debt or debts, should be recorded in the office of the clerk of the county court, of the county wherein the person making such deed or conveyance shall reside, within thirty days, or else the same shall be void against creditors and subsequent purchasers, without notice. Held, the statute applied to mortgages.¹ Taylor, J., says:² — "There can be no doubt but that a conveyance of slaves is a conveyance of personal property; and just as little, that mortgages are included within the meaning and intention of the legislature. The object of the act is to give notice to the world of the liens which are held on property, by persons out of possession, so as to prevent credit from being given to the holders, on account of the possession of it. Our Courts have uniformly decided that a mortgage, or deed of trust, honestly executed, to secure the payment of a *bonâ fide* debt, to be paid *in futuro*, was valid, although the mortgagor, &c., was left in possession of the property, and that it was not necessary for the mortgagee, or trustee, to take possession even when the day of payment arrived, to secure the interest of the creditor. Although these decisions are believed to be strictly legal, and in accordance with the soundest policy, yet it is certain that it behooved the legislature to throw every guard around the honest members of the community, that was possible, to protect them from the arts and combinations of the fraudulent. The Act of 1828 was therefore passed, requiring all persons holding the liens, to take such steps as were calculated to give notice of them to

¹ *McGregor v. Hall*, 3 St. & P. 397.

² *Ib.* 401, 402.

others, by having them recorded in the several offices prescribed by law for that purpose. Every reason which could have influenced the general assembly to provide, that deeds of trust to secure debts should be registered, operates in an equal or greater degree with respect to mortgages. The circumstance that an indifferent person is made a party to a deed of trust, in addition to the debtor and creditor, while to a mortgage the latter only are parties, is, in itself, highly calculated to cause its existence to be more known. Deeds of trust, long before the enactment of the Act of 1828, had become much the most common mode of securing creditors, and to this is to be ascribed their having been particularly named." (d)

(d) A similar rule of construction was adopted in the case of *Hodgson v. Butts*, (3 Cranch, 140,) where it was held, that a mortgage of chattels came within the provisions of a statute, which declared that "all deeds of trust and mortgages whatever" should be void as to creditors, &c., unless acknowledged or proved by three witnesses; although the general object of the act was to regulate the probate of deeds conveying real estate. This construction was adopted in part upon the ground, that there was no other law in Virginia providing for the registry of chattel mortgages, and upon previous decisions on the same subject. Marshall, C. J., says, (1b. 157, 158,) "In a country where mortgages of a particular kind of personal property (ships) are frequent, it can scarcely be supposed that no provision would be made for so important and interesting a subject. The inconvenience resulting from the total want of such a provision would certainly be great; and the Court, therefore, ought not to suppose the case to be entirely omitted, if there be any legislative act which may fairly be construed to comprehend it. The act concerning conveyances, although not penned with that clearness which is to be wished, does yet contain terms which are sufficient to embrace the case."

In Indiana, the Court remark, in a case somewhat similar: "The statute requires such mortgages to be acknowledged or proved, and recorded within a certain time; but it does not say before whom the acknowledgment or proof shall be taken. Rev. Stat. 1838, p. 470. We think that, under these circumstances, the proof could be made before the Recorder, who had, when the statute just mentioned was passed, and who still has, authority to take the acknowledgment and proof of other deeds required to be recorded. Rev. Stat. 1838, p. 312." Per Blackford, J., *Hamilton v. Mitchell*, 6 Blackf. 132.

11. But, in Pennsylvania, a statute, requiring voluntary assignments for the use of creditors to be recorded within thirty days, was held not to apply to a mortgage for securing the payment of money.¹ Kennedy, J., says:² — “It is a *mortgage* of the goods described in it, and not an *assignment* or *absolute* transfer or conveyance thereof, but *conditional* merely. The two instruments are very different from each other in their nature; the one is an *absolute* and *indefeasible* conveyance of the subject-matter thereof, whereas the other is only *conditional* and *defeasible*. Consequently the authority and right derived from the two instruments to the grantee are very different.” He proceeds to show the inapplicability of many of the provisions of the act to mortgages, particularly that which requires assignees within one year to settle their account. “It seems impossible to apply this principle of these acts to mortgages, without making every debt, to secure the payment of which a mortgage is given, payable within a year after its execution. But this would be an utter surprise upon everybody; for it has never before, I think, entered into the mind of any one, notwithstanding the passage of these acts of assembly, to conceive, that as long time could not be given for the payment of a debt secured by mortgage as the parties should choose to agree on.”

12. With regard to *the nature of the property*, a mortgage of which requires to be registered; it has been held in Massachusetts, that the provision of the Rev. Stats. c. 74, s. 5, applies only to goods susceptible of delivery, not to *choses in action*; as for instance a legacy, the conditional assignment of which will be valid without registration.³ So an assignment or mortgage of choses in action in Kentucky, made by persons residing out of the State, need not be recorded in Kentucky.⁴ And it has been said, upon somewhat similar reasons: — “It may well admit of doubt, whether the statute (of Massachusetts) was intended to apply to any cases of

¹ Ridgway v. Stewart, 4 Watts & S. 383.

² Ib. 392.

³ Marsh v. Woodbury, 1 Met. 436; Newby v. Hill, 2 Met. (Ky.) 530.

⁴ U. S. &c. v. Huth, 4 B. Mon. 423.

mortgages of undivided interests in personal property, of which, of course, no exclusive possession could be given to, or retained by, the mortgagee."¹

13. It has been stated in general terms, that registration of a mortgage is necessary, as against creditors or subsequent purchasers. But it is to be further remarked, that, as registration is designed to *give notice* of the mortgage, to third persons who may become interested in the property, *actual notice*, obtained in some other way, may preclude a party from availing himself of the want of registration.² (e) Upon this subject, however, different doctrines have prevailed in the several States; in some of them a distinction being made, with regard to notice, between mortgages of personal property and those of real estate, which have uniformly been held valid, without recording, against parties with actual notice. Questions have also arisen, as to the kind and amount of information necessary to constitute legal notice, or to charge a party, who becomes interested in the property subsequently to the giving of a mortgage, with negligence, in failing fully to inform himself in respect to such mortgage.

14. Three cases upon this subject have occurred in Massachusetts. In *Denny v. Lincoln*,³ it was intimated, though not distinctly decided, that personal property mortgaged may be attached or taken on execution by a creditor of the mortgagor, even though he has actual notice of the mort-

¹ Per Story, J., *Winsor v. McLellan*,
2 Story, 500.

² *Low v. Pettengill*, 12 N. H. 339.
³ 13 Met. 200.

(e) The following remarks upon the subject of notice are made by the Court in New York, but can hardly be considered as an exact expression of the prevailing rule of law. "It is said, the plaintiffs had notice of the lien by mortgage. This is an objection of a very ancient date, one which has been often made, but never without being overruled. The obvious consequence of listening to it would be to furnish a ready expedient for protection to fraud of the kind now alleged in all cases. A creditor having notice of a fraudulent mortgage is a reason why he should bestir himself to avoid it." Per Cowen, J., *White v. Cole*, 24 Wend. 123, 124.

gage, unless it has been recorded according to law. But, if any notice will preclude such seizure, it must be a notice full, clear, and explicit, designating and identifying the property by marks and numbers or other description; especially when the mortgagor remains in possession. The notice must also express the sum for which the property was bound, and generally give substantially the same information as would be given by an inspection of the deed. Hence such notice is insufficient, where the debtor merely informs his creditor that his machinery is mortgaged for a certain sum, when in fact only a part of it was mortgaged, and there was other property of like kind, in the same mill, which was not mortgaged. In giving the opinion of the Court, Shaw, C. J., says,¹ upon the general question:—“There is no exception in the Rev. Sts. c. 74, § 5, of such actual notice, as there is in reference to a deed of real estate, in Rev. Sts. c. 59, § 28. But the case of *Houghton v. Bartholomew*, 10 Met. 138, was strongly urged as a case in which it has been decided, that a person having notice of a sale of an equity of redemption at an officer's auction sale, though not recorded within the time required by law, could not attach against such unrecorded deed. Adhering to the old rule on that subject, without impugning the authority of that case, we think there are so many and such marked differences between the rules governing the conveyance and transfer of real and personal estate, that it is not safe to rely upon the analogy between them.”

15. In the case of *Travis v. Bishop*,² it was held, that, where personal property is mortgaged, without delivery or registration, a purchaser from the mortgagor, who takes possession, will hold the property against the mortgagee, though he had knowledge of the mortgage. Shaw, C. J., says:³—“There having been no delivery of the horse and no registration of the mortgage, the plaintiff has not established his title to the property, so as to maintain this action against the defendant, who claims under a sale and delivery, and is not a

¹ 13 Met. 202.

² *Ibid.* 304.

³ *Ibid.* 306.

party to the mortgage. The provision in the Rev. Sts. c. 74, § 5, conforms in terms to St. 1832, c. 157, § 1, under which the Court decided the case of *Bullock v. Williams*, 16 Pick. 33. That case proceeded on the ground that, by force of the statute, registration was sufficient to give effect to a mortgage of personal property capable of being identified by a written description. But it seems to be distinctly implied from the case, that, without either possession or registration, the mortgage could not be valid, either by common law or by statute."

16. In the case of *Shapleigh v. Wentworth*,¹ the decision of which turned upon the form and alteration of a verdict, the same Judge says:—"Without deciding the question, whether an unrecorded mortgage of personal property is valid against an attaching creditor with notice, the Court are of opinion that this verdict cannot be sustained. The Jury had been directed, that if the attaching creditor had actual notice, and if the mortgagee took actual possession before the attachment, and retained it till the property was attached, they should find for the plaintiff. The Jury returned the first fact, that the attaching creditor had notice, and said nothing of the other, namely, whether the mortgagee took and retained possession. Without the latter, it is very clear that the mortgage could not be valid."

17. In New Hampshire, cases have occurred involving the same points. In *Smith v. Moore*,² Parker, C. J., says:—"It does not appear to be well settled what may amount to a sufficient notice, short of actual knowledge of the existence and contents of the deed. In relation to real estate, possession puts a party on inquiry, and he is chargeable with notice of all he might have learned upon such inquiry. Further than this it is believed that little has been settled. Under the statute of 1832, a mortgagee of personal property may fully secure his rights, by taking and retaining the possession. This undoubtedly is equivalent to a record. But a symbolical delivery is not sufficient. There must be such a

¹ 13 Met. 362.

² 11 N. H. 65.

possession as is required to be taken by the vendee on an absolute sale, and the possession must be retained in the same manner." (*f*)

18. In *Stowe v. Meserve*,¹ it was held that seasonable notice of an unrecorded mortgage may be sufficient to put the party on inquiry, and charge him with notice, if neglected. But not if received after the creditor has procured process, and is proceeding to attach or levy. (*g*) Whether actual knowledge would then be sufficient is a point of doubt. Parker, C. J., after referring to the principles established by the decisions, and sometimes incorporated in statutes, with regard to registration of conveyances of real estate, and the effect of *notice* as a substitute therefor, proceeds to remark:² "The exception should be carefully guarded. If we look to the reasons on which the exception has been founded, a notice cannot be sufficient, under circumstances where it would operate as a fraud instead of preventing one, and to hold that a notice to a creditor may be effectual when it is not given until he has procured his process, and is about to attach the property, would most effectually encourage fraud. In fact, if notice by the debtor to the sheriff were held sufficient, it would almost render nugatory the statute requiring mortgages of personal property to be recorded; for if the mort-

¹ 13 N. H. 46.

² *Ibid.* 51, 52.

(*f*) He further remarks, with reference to a supposed *lien* as affecting the question of possession: "The lien of the mill-owners, who held the lumber in process of manufacture, furnishes no sufficient excuse for a neglect to take possession. For ought which appears, that might have been discharged, or some arrangement for securing the possession to the plaintiff have been made with them. But if that could not have been done, measures might have been taken to preserve a possession in the plaintiff, subject to their lien." 11 N. H. 65.

(*g*) Notice binds the purchaser, if received before execution of the conveyance and payment of the purchase-money. *Merrill v. Dawson*, 1 Hemp. 563.

See the same case, as to the circumstances sufficient to charge purchasers with actual notice; as common report, proclamation at sale, &c.

gagee could depend upon the custody, care and diligence of the mortgagor, it would not be necessary to record any such mortgage. It would only be necessary when any one came to attach, that notice should be given. The tendency of recent decisions is to confine the exception within reasonable limits. If it be difficult to say under what precise circumstances, and at what precise time, the creditor must have knowledge of the existence of the mortgage, in order to render an attachment ineffectual, it must at least be such reasonable notice that the omission to record will not operate as a trap for creditors. The evidence only shows an allegation of the debtor himself that he had executed a mortgage. This at most would be only matter to put the creditor upon inquiry. But he had then no opportunity to make any, without abandoning his purpose of attachment; for if the notice could be held available for any purpose, the creditor must have suspended his proceedings until he could have investigated the subject, at the risk of losing his opportunity to attach; so he must have proceeded under the penalty of being a trespasser, if the mortgage were found afterwards actually to exist. Information of that character, from such a source, at such a time, is in no sense 'equivalent to a record.' Nor can the fact that the creditor proceeded, notwithstanding, to levy his execution, be regarded as a fraud upon the plaintiff, who had neglected to give a legal notice by placing his mortgage upon record."

19. In South Carolina, an unrecorded mortgage of chattels is good, except against a transfer of the same goods from the same person, previously recorded. And where a slave is sold under the foreclosure of a mortgage not recorded, the purchaser will hold it, as against a purchaser subsequent to the mortgage, whose bill of sale was not registered till after the commencement of an action of trover for the property by the former purchaser.¹

20. In Maine it is said,² all parties claiming under the

¹ *Youngblood v. Keadle*, 1 Strobl. 121.

² *Abbott v. Goodwin*, 7 Shepl. 407.

mortgagor stand by substitution in his place, and are equally bound by the contract, whether having notice of it or not.

21. In New York, a mortgage, though neither registered nor accompanied by delivery, has been held valid against a purchaser or second mortgagee, with notice.¹ Omission to *re-file* gives no rights to a subsequent mortgagee with notice.²

22. In Arkansas it is held, that a creditor of the mortgagor of a slave may validly attach such slave, though he have notice of the mortgage, unless it is recorded.³

23. In Alabama, the statute relating to registration is held not applicable to creditors and purchasers having notice; as, for instance, to a purchaser from one not in possession.⁴ In Illinois, a mortgage is good as to third parties who purchase with knowledge of it. They acquire only the right of redemption.⁵

24. The record of a mortgage is notice only of the contents of the mortgage itself. Thus where mortgaged property was sold, and a bond not referring to the mortgage taken for the purchase-money; held, the record of the mortgage was not notice thereof to a purchaser of the bond.⁶

25. A previous chapter — ch. 41 — was specially devoted to the consideration of mortgages of *ships*. The following case illustrates the effect, in the way of notice, of the peculiar mode of registration practised with this kind of personal property.

26. Where a ship-broker advances money to a ship-owner for the use of the vessel, having notice, by an indorsement on the certificate of registry, of a prior mortgage; he cannot claim repayment from the freight in preference to the mortgagee, although the latter does not take possession till the ship has entered the docks from her homeward voyage.⁷

¹ Sanger v. Eastwood, 19 Wend. 514; Gregory v. Thomas, 20 Wend. 17. But see Farmers', &c. v. Hendrickson, 25 Barb. 481.

² Hill v. Beebe, 3 Kern. 556; acc. Wetherell v. Spencer, 3 Mich. 123.

³ Mann v. Alexander, 4 Eng. 112.

⁴ Smith v. Zucher, 9 Ala. 208; Boyd v. Beck, 29 Ala. 703. See Copeland v. Bennet, 10 Yerg. 355.

⁵ Hathorn v. Lewis, 22 Ill. 395.

⁶ Green v. Warrington, 1 Desau. 430.

⁷ Gibson v. Ingo, 6 Hare, 112.

Wigram, V. C., says:—"Notice that the ship was mortgaged, especially in the case of brokers who knew of the charter-party, was sufficient to put (the brokers) upon inquiry, whether this mortgage of the ship, of which they had notice, did not include her freight, earnings, and profits." (*h*)

27. The general statutory provision is, that a mortgage shall be recorded in the town where the mortgagor resides. Questions have arisen, with regard to the effect upon the rights of the parties, of the mortgagor's removal from the place of his residence at the time of executing the mortgage, and the necessity of a new registration in his new place of abode. (*i*)

28. It is held that registry laws can have no force beyond the jurisdiction of the sovereignty enacting them. Hence the record of a mortgage in Canada is no notice to creditors who find the property in the mortgagor's possession in Michigan. And neither the statute of Canada nor of Michigan dispenses with the necessity of possession by the mortgagee, except

(*h*) The following case bears upon the same point, of notice, though not of registration. Mortgage of a vessel and cargo in London, the vessel being then on a whaling voyage to the South Seas, subject to two prior mortgages. The third mortgagee gave immediate notice to the others. Subsequently, the master, putting into Sydney, transhipped the oil to another vessel, consigned to parties in London, who honored his draft, upon having a lien on the consignment. The mortgagor obtained an advance on a mortgage of the cargo so transhipped and consigned, without notice of any charge thereon but that of the consignee's lien, to whom the lender gave notice of his mortgage. The third mortgagee, as soon as he knew of the consignment, (but subsequent to the notice of the fourth,) gave notice of his mortgage to the consignee; who afterwards, having satisfied his own lien, paid over the balance of the proceeds of the oil to the fourth mortgagee. Held, the third mortgagee was not bound to send letters to meet the master wherever the vessel might possibly be, and, having done all he could towards possession, was entitled to priority over the fourth. *Feltham v. Clark*, 1 De Gex & Sm. 307.

(*i*) In Indiana, the principal office within the State of a corporation mortgagor, and not the *situs* of the property, determines the county of residence. *Wright v. Bundy*, 11 Ind. 398.

where notice can be rendered effectual by recording the mortgage.¹ So a mortgage, appearing on its face to have been executed in another State, will not be upheld to defeat the title of an innocent purchaser in Indiana, though shown to have been recorded in the county where executed, it not being valid at common law, and not shown to be valid by the *lex loci contractûs*.²

29. But, in Ohio, notwithstanding removal of the property to another State, the record is effectual to sustain the mortgagee's title.³ So where the property is in Massachusetts, but the parties to the mortgage are citizens of Rhode Island; it is sufficient that the mortgage be executed and recorded according to the laws of Rhode Island, as against an attaching creditor, living in Rhode Island.⁴

30. In New Hampshire it has been held, that, where a mortgage is made out of the State, and is valid according to the laws of the State in which it is executed, and the property is afterwards removed to New Hampshire, no registration is necessary.⁵ Upham, J., says: ⁶ — “ The property was there, the contracting parties were there, and, on every principle, the *lex loci* governs. The property then passed by the mortgage, vesting the title conditionally in the plaintiff. Numerous cases have been cited in the conflict of laws betwixt different governments, but the case does not seem to us properly to involve a question of that description. The conveyance in Massachusetts, under the laws of that State, raised no conflict with our laws here; neither did the removal of the property within this jurisdiction. It is strictly a question as to the effect of our laws on property for the first time brought within our jurisdiction. Where did the mortgagor reside when this mortgage was made? Confessedly not within the limits of this government; but it so happens that in the town where he did then reside, the mortgage was duly recorded; but whether this had been so or not, if the conveyance had once become legally a mortgage, it

¹ *Montgomery v. Wight*, 8 Mich. 143.

² *Blystone v. Burgett*, 10 Ind. 28.

³ *Kanaga v. Taylor*, 7 Ohio, N. S. 131.

⁴ *Rhode Island, &c. v. Danforth*, 14 Gray, 123.

⁵ *Offutt v. Flagg*, 10 N. H. 46.

⁶ *Ibid.*

would after that time, for aught that appears in our statute, always remain a mortgage. The moving of the property from place to place, whether within our own limits, or from a foreign government here, does not contravene any of the provisions of this act. The law is silent upon the subject." He proceeds to remark, that the requisition of registry is an exception to the general rule, by which the simple execution of an instrument passes the title, and cannot be implied, and that a contrary doctrine would enable a mortgagor at any time to defeat the mortgage by removing to another place. A creditor is bound to know that his debtor has removed from another town or State.

31. In the same State it has been held, that, if the mortgagor of goods within the State resides out of the State, at the time of making the mortgage, the mortgage is invalid against creditors of the mortgagor, without delivery and possession, unless in case of actual notice; that symbolical possession is insufficient; and that there must be the same delivery and possession as in case of absolute sale.¹ Parker, C. J., says :² — "The record in the town clerk's office, provided for by the statute, is a record within this State, and not within another government. The second section of the act makes it the duty of the town clerks to record such mortgages; and it is very clear that this provision cannot apply to town clerks out of the State, even in those governments where such an office exists. It is by no means clear that notice will answer the purpose, in cases where no record can be made under the statute of 1832. If notice is merely equivalent to a record, the inquiry arises, what is the effect of a record? and if that can have no effect, because none can be made, a notice may be inoperative."

32. If the mortgagor, after making the mortgage, change his residence to another town; no new registration in that town is necessary.³ Wood, J., after remarking that at com-

¹ *Smith v. Moore*, 11 N. H. 55; *Winsor v. McLellan*, 2 Story, 492.

² *Ib.* 64.

³ *Hoit v. Remick*, 11 N. H. 285; *Big-*

elow v. Weaver, Sup. Jud. Ct. Mass., Law Rep. April, 1849, p. 558; *Whitney v. Heywood*, Mass. Oct. 1850, Law Rep. July, 1852, p. 169.

mon law the mortgagor's possession is only evidence of fraud. proceeds as follows:¹ — "The object of the statute was to give publicity to such conveyances, and to provide sources of information common to all persons, in order to enable purchasers, and creditors, and all others, to determine with some degree of facility, convenience, and certainty, the question of title to property, which they may be interested to know; while, at the same time, it was not among the purposes of the act to subject the *bonâ fide* mortgagee, who is of course a creditor, to the inconvenience, if not impracticability, of the constant vigilance and ceaseless watching which would be requisite to guard and secure his interests, if he were obliged to record his mortgage in every town into which the mortgagor might see fit to remove with the property to reside; and that, too, before his creditor should seize the property by process of law, or the mortgagor should pass the title to it by way of sale, to some innocent purchaser."

33. A mortgage, made in Alabama, the residence of the mortgagee, by an inhabitant of South Carolina, of property in the latter State, need not be recorded in the former.²

34. The Alabama Act of 1823, requiring a mortgage of property, which may be removed there from another State, to be recorded within twelve months, makes such property, in the absence of a record, liable to the debts of the party in possession, but does not apply to purchasers without notice.³

35. In New York, (by the Laws of 1833, p. 402,) personal mortgages were required to be filed (except in the city of New York and county towns,) in the clerk's office of the city or town where the mortgagor resided at the execution of the mortgage, if he was a resident of the State; if not, in that of the city, &c., where the property then was. Held, a title could not be maintained under such mortgage, as against a purchaser upon an execution against the mort-

¹ *Holt v. Remick*, 11 N. H. 289.

² *Fishburne v. Kimhardt*, 2 Speers,

³ *Beall v. Williamson*, 14 Ala. 55.

gagor, where there was no evidence as to the residence of the mortgagor when it was executed.¹ But the mortgagor may be a resident of another town at the time of filing.²

36. In Kentucky, if a mortgage is made and recorded in one county, and the mortgagor comes to another county, where he resides, and sells the property to a *bonâ fide* purchaser, the latter shall hold against the mortgage.³

37. Before the Act of 1820, as to registration, a mortgage, made in 1819, and recorded within eight months, in the county where the mortgagor resided, and where a part of the property was at the time, is valid as against a subsequent purchaser, who was not, at or after the date, in such county.⁴

38. Under the registry law of Virginia, of 1792, a mortgage of personal property must be recorded in the General Court, or the County Court of the county where the grantor resides at the time of its execution, or it will be void as to creditors; and it is not sufficient to record the same in the County Court of the county in which the property is, the grantor residing in a different county.⁵ So, where a mortgage of slaves was recorded in one county, the slaves being at the time of making and recording the mortgage in another county, and they were afterwards removed to the former, but the deed was not recorded anew; a second mortgage, made and recorded in the former county, was held, under 1 Rev. C. c. 99, § 11, to prevail over the first.⁶ Brockenbrough, J., says: ⁷ — “The statute provides, that every deed of trust of personalty, which ought to be recorded, shall be recorded in the Court of that county in which such property ‘shall remain.’ At the time the deed was recorded in Southampton, and between that period and that in which the slaves were carried to Southampton, the deed was void as to purchasers, &c., because the slaves were remaining in a different county, namely, Sussex. Did the subsequent

¹ Smith v. Jenks, 1 Denio, 580.

² Hicks v. Williams, 17 Barb. 523.

³ Vaughn v. Bell, 9 B. Mon. 447.

⁴ Singleton v. Young, 3 Dana, 559.

⁵ Bond v. Mewburn, 1 Brock. 316.

⁶ Lane v. Mason, 5 Leigh, 520.

⁷ Ib. 521, 522.

removal of them to Southampton, give life and energy to the deed which had been void before? I think not. In what clerk's office would a purchaser of these slaves, or a creditor of Cooper, look for a deed passing the title to some one else? Certainly he would examine the Sussex office, because in that county the slaves were abiding. When, at a posterior period, they were removed to Southampton by the visible owner of them, he would not look to the registry of deeds in that county, at any prior time; because, during such prior time, the slaves were not there, and he could not expect to find any deed for slaves that were not remaining there; that is, residing or abiding there. The recording of the deed in Southampton before the slaves were removed, was not constructive notice to purchasers and creditors."

39. A mortgage of slaves is valid in Mississippi, though not recorded there, if executed in a State where the master and slaves then resided.¹ (j)

40. Mortgage of a slave with other chattels in Georgia, where both parties resided, to secure a note payable in six months. The mortgage was not recorded within the time prescribed by law, and the mortgagor remained in possession. The note was discounted in bank, partly paid when due, and renewed for the balance by another note at six months. Before maturity of the second note, the mortgagor removed the slave to South Carolina, and sold him to a *bonâ fide* purchaser, whose bill of sale was never recorded. The mortgagee paid the new note before maturity, seized the slave in South Carolina, carried him back to Georgia, had his mortgage recorded, and afterwards foreclosed. Held, the purchaser might maintain trover against the mortgagee.²

¹ Barker v. Stacy, 25 Miss. 471.

² Ryan v. Clanton, 3 Strobb. 411.

(j) A deed of trust, executed in Mississippi and recorded in Louisiana, which expresses that it was given to secure a certain amount, and also future advances, cannot be enforced in Louisiana, to the prejudice of other mortgage-creditors, except for the amount specified. Bowman v. McKleroy, 14 La. An. 587

41. Where the statute requires registration in the town in which the *mortgagor* resides, registration in the town where the *mortgagee* resides is of no avail.¹

42. A statute, requiring registration in the town where the mortgagor resides, and also in that in which he transacts his business, does not apply to a mortgage made out of the State, though by a citizen of the State.²

43. Nice questions have arisen, in regard to *the form of registration* of mortgages of personal property. The general principle seems to be established, that the statutory requisitions must be strictly complied with, in order to make the mortgage effectual against third persons.

44. Where it is not expressly prescribed by law, within what time a chattel mortgage shall be filed, such mortgage cannot be declared void because it was not filed at the time of its execution.³

45. It has been held in Maine, that, in order to be legally recorded, under the Revised Statutes, c. 125, sects. 32, 33, the time of receiving a mortgage must be noted by the clerk, both in the book of records and on the mortgage.⁴ In support of this opinion, Whitman, C. J., makes the following remarks upon the language of the statute:⁵ — “The Revised Statute, c. 125, sects. 32 and 33, requires that all mortgages of personal estate, made as collateral security for any debt, exceeding thirty dollars in amount, shall be recorded in the clerk’s office of the town where the mortgagor resides, unless accompanied with actual possession by the mortgagee; and, unless so recorded, that the same shall be void, except as between the parties thereto. The statute provides, that ‘it shall be considered as recorded when left as afore-said with the clerk.’ The clerk, on payment of his fees, shall ‘record all such mortgages, in a book kept for that purpose, noting in the book, and on the mortgage, the time when the same was received.’ In cases of mortgages of real estate,

¹ Stowe v. Meserve, 13 N. H. 46.

⁴ Handley v. Howe, 9 Shepl. 560.

² Langworthy v. Little, 12 Cush. 109.

See Paine v. Mason, 7 Ohio, N. S. 198.

⁵ Ib. 561-563.

³ Hicks v. Williams, 17 Barb. 523.

(Rev. Stat. c. 11, s. 17,) the register, at the time of receiving any deed to be recorded, ‘shall make a memorandum thereon of the day, and the time of the day, when it was received and filed;’ after which it is to be considered as recorded. When the legislature, in reference to personal estate, super-added to the noting on the mortgage, the noting of the same in the book, did they not mean that these should be simultaneous acts? What was the object of this noting in either case? It must have been to enable persons, not parties to the deed, to ascertain when the property actually passed. The noting in the book was much better calculated to subserve this purpose, than the mere noting, upon the mortgage, of the same circumstance. Individuals applying to ascertain if their debtors had conveyed away their property would naturally look to the record; and as the law provides for noting ‘in the book,’ if no record was made, recourse would be had to the noting ‘in the book;’ and, if no such noting or record of a conveyance were found, the conclusion might well be, that none existed. The legislature has prescribed both of the notings, as it were, in the same breath; and this would seem to indicate that they were to be simultaneous. We can have no authority for saying, that either of the notings prescribed was to be a substitute for the actual recording, more than the other.”

46. The following more recent case in the same State, though in some points a little obscure, may be cited as bearing upon the proper construction of the same statute. In *Holmes v. Sprowl*,¹ it was objected on behalf of an attaching creditor, that it did not appear that the clerk noted the time when the mortgage was received, either on the mortgage, or on the book kept for that purpose. The Court, in overruling the objection, remark:²—“The object to be accomplished was the recording of the mortgage, to give notoriety to the transaction. By the noting in the book, and on the mortgage, the time when the mortgage was received, it was to be considered as if it was recorded when left with the clerk.

¹ 31 Maine, 73.

² *Ib.* 75.

The subsequent recording had relation back to the time of noting, and the mortgage was to be considered as recorded at the time stated in the noting. The phrase, 'and it shall be considered as *recorded* when left as aforesaid with the clerk,' must mean, that the reception of it and the noting by the clerk should be considered as having the same effect as if the recording took place at the time of the delivery, and that it would be valid, although it was not recorded until a subsequent time. If it is recorded, that is a compliance with the law, and if it is wholly extended upon the record, and the time stated, before third persons acquire any right to the property, the interest of the mortgagee is secured. If a mortgagee would go back to an earlier time than that stated upon the record when his mortgage was recorded, and claim from the time when his mortgage was first left, he can only do so by showing the time noted in the book and upon the mortgage."

47. In New York, a person having charge of the town clerk's office, there being at the time no town clerk, received a mortgage which was brought there to be filed, and indorsed it *filed*, with the date, and placed it on file. Held, a valid filing.¹

48. A statute of New York (1837, p. 403, s. 3) provided, that "every mortgage filed in pursuance of this act shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees, in good faith, after the expiration of one year from the filing thereof; unless within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him, by virtue thereof, shall be again filed in the office of the clerk or register aforesaid of the town or city where the mortgagor shall then reside."

49. Statutes of this nature are to be strictly construed.² Filing is necessary, though the mortgage by its terms has

¹ Bishop v. Cook, 13 Barb. 326.

² Ely v. Carney, 3 E. D. Smith, 489.

become absolute.¹ Where such second copy was filed, it was held that the mortgage ceased to be valid after a year from such filing, unless a third copy was filed within thirty days before the year expired; and that Sunday should be counted as one, though the last of the thirty days.²

50. Under that statute, each copy filed is considered a new mortgage.³

51. A mortgagee of chattels, the original mortgage having been filed in the town clerk's office within thirty days prior to the expiration of a year from the time of filing, procured an indorsement of the words, "refiled and renewed," with the date, to be made thereon, which was signed by the clerk. Held, not a sufficient statement of "the interest of the mortgagee in the property" under Stat. 1833, p. 403, s. 3, and that the mortgage, at the expiration of the year, became invalid as against the creditors of the mortgagor.⁴ But where a mortgagee of chattels advertises them for sale under a power of sale in the mortgage, previous to the expiration of one year from the filing of the mortgage; this excuses him from filing the mortgage within thirty days previous to the expiration of the year, as required by the third section of the act (Laws of 1833, p. 402) in relation to chattel mortgages.⁵

52. This section is applicable, only where the mortgagee allows the mortgagor to continue in possession after the expiration of the year, without taking the property into his actual possession, or adopting some proceeding to enforce a forfeiture, or to sell the equity of redemption previous to the expiration of the year from the filing.⁶

53. In the same State the term "subsequent," in § 3, of the act requiring mortgages to be filed, &c., means after the time for re-filing has elapsed.⁷

54. Omission to re-file before the expiration of the year

¹ *Lily v. Carney*, E. D. 3 Smith, 489.

² *Nichols v. Townsend*, 2 Sandf. 299.

See *Latimer v. Wheeler*, 30 Barb. 485;

Paine v. Mason, 7 Ohio, N. S. 198.

³ *Ibid.*

⁴ *Fitch v. Humphrey*, 1 Denio, 163.

⁵ *Oris v. Sill*, 8 Barb. 102.

⁶ *Ibid.*

⁷ *Latimer v. Wheeler*, 30 Barb. 485.

will not render it invalid as against a subsequent mortgage executed within the year.¹

55. By a statute of Rhode Island (1834) it was enacted, that no mortgage of personal property should be valid, except as between the parties, unless possession accompanied the deed, or it were recorded in the office of the town clerk. It was also made the duty of the clerk to record such mortgages in a book kept for that purpose. In *Anthony v. Butler*,² a mortgage was made of certain lands in Rhode Island, with a woollen mill and other buildings, and the machinery in the mill. The mortgage was recorded by the town clerk of the place where the property was. He kept two books, in one of which he recorded mortgages including real estate; and in the other, mortgages upon personal property only. This mortgage was recorded in the former book, and the following certificate given by the clerk: "Lodged in the town clerk's office to record, November 20, 1837, at 5 P. M., and recorded same day, in the record of mortgages in East Greenwich, book No. 4," &c. Held, a sufficient registration, and that the certificate was competent evidence. McLean, J., says:³—"The object of the recording act is to give notice to subsequent purchasers. The statute undoubtedly requires the clerk to record mortgages for personal property only, in a book kept for that purpose. This being the requirement of the law, to which the clerk strictly conformed, there could be no uncertainty in searching the record for a personal mortgage. But it seems that the statute did not expressly provide, in what book a mortgage like the one under consideration, for both real and personal property, should be recorded. And it appears that it was the usage of the office to record such mortgages in the book which contains mortgages for real estate. Now, if this be insufficient, nothing short of recording such a deed in both books could be held a compliance with the statute. The conveyance of the personal and real property is so blended in the mortgage as to be inseparable. To require a double record would seem

¹ *Latimer v. Wheeler*, 30 Barb. 485.

² 13 Pet. 423.

³ *Ib.* 434.

to be an unreasonable construction of the statute, as it cannot be necessary to effectuate its object. Both records are kept in the same office, and by the same person, who performs the duties of the office, and must always be well acquainted with its usage. Any inquiries of the clerk for the record of a mortgage like the one under consideration, would as certainly lead to it, under the usage, as if it were recorded in both books. If this mortgage had been recorded in the book for personal mortgages, the same strictness as now contended for might be urged against such record book, as it would not then be kept exclusively for personal mortgages."

56. In case of a mortgage of all the merchandise in a store, but referring to a schedule as a part thereof, the schedule must be recorded with the mortgage. And, where actual notice is relied on, it must be notice of the schedule as well as the mortgage.¹ Tenney, J., says:² — "This is a very general description, and one which would give the person holding under such an instrument no little trouble in tracing the property, if it should be removed from the store; and they (the goods) being left in the custody of the mortgagor, it would seem reasonable that the mortgagee should insist upon a more specific and certain description. It is not easy to perceive why it may not, at least, be equally important to those whose interests are to be protected by the recording such instrument, when that record may be the only means of knowledge of the debtor's ability to pay. If the mortgagee protects himself by such a description as this schedule contains, it is not for him to exclude other creditors from the means of equal knowledge. If the mortgage and schedule were left with the town clerk, and duly entered by him, and both were remaining in his office unrecorded, it might have been sufficient, for the originals of both could have been seen and examined, and were all which was in the office indicative of the plaintiff's claim; but when it appeared that the town clerk had made up his record, it was

¹ *Sawyer v. Pennell*, 1 Appl. 167.

² *Ib.* 170, 171, 173.

that only which the law treats as the evidence required.' But a schedule of property referred to in a mortgage, but not declared to be a part of, or annexed to it, need not be recorded.¹

57. In the following English case, a less rigorous rule seems to have been adopted with regard to the form of registration, than has generally prevailed in this country.

58. A mortgage was made to secure four bills of exchange of £600 each, and interest and future advances; but the mortgage, as described on the indorsement of the certificate, was stated to be for securing payment of £600, and all sums of money which may hereafter become due. Upon this state of facts it was contended, that the plaintiff could claim only one sum of £600, with further advances and interest, as against ship-brokers, claiming the certificate of registry on account of advances made by them. But it was held, that the mortgage was a valid security for the whole debt.² Wigram, V. C., says: ³ — "It is not necessary that I should give an opinion, what, if in this particular case fraud or culpable negligence were imputable to the plaintiff, the decision should be. I cannot, upon the evidence, conclude that such was the case; but the contrary." (His Honor stated the evidence, and his conclusion, that the omission in the indorsement to mention more than one of the bills of exchange was an error of the public officer.) "If the indorsement, though inaccurate, had not to the extent of £600 been definite, there would be no doubt upon the case. If a person knows that another has or claims an interest in property, he, in dealing for that property, is bound to inquire what that interest is, although it may be inaccurately described. The question here is whether he (the plaintiff) is bound by his own representation, though made by mistake. If I am to consider (the brokers) as misled, to their damage and injury, by the error, it might be right, as between two innocent parties, that the one who misled the other should bear a loss occa-

¹ Chapin v. Cram, 40 Maine, 561.

² Gibson v. Ingo, 6 Hare, 112.

³ Ibid. 123, 124, 125.

sioned by his own mistake. But if (the brokers) have not been to their damage and injury misled, there is no reason why the plaintiff's original priority should be taken from him, although the indorsement does not correctly represent the details of the plaintiff's mortgage. It represents it as being of indefinite amount, as liable to indefinite increase. It is impossible, therefore, that Carter & Bonns can have relied upon having any specific amount of security, or intended to do more than take their chance. They made no inquiry, because no inquiry could have been of use. The answer to inquiries would have been, there is no limit to our right, except what the value of the freight and earnings may impose."

59. Registration, to be effectual, must be open, positive, and immediate. The law does not sanction any proceeding on the part of the mortgagor, by which he seeks at the same time to avoid publicity in the transfer, and obtain the benefits of recording the mortgage. Thus the maker of a mortgage filed it, but told the clerk that it was merely to keep off creditors, and that he would take it off file directly. He did so, and assumed entire control of the mortgage. The mortgagees knew nothing of the mortgage until after a sale by the mortgagor. Held, the mortgage was never delivered, either expressly or impliedly, and the purchaser, though he had full notice, had a good title.¹ So a mortgage was intrusted by the mortgagee to the mortgagor, who left it with the town clerk, with instructions to "keep it out of sight for a few days," and the clerk assented to this request. Held, the clerk had no authority to record it, till this instruction was withdrawn; and an attachment made in the mean time upon a writ against the mortgagor was valid.² Upham, J., says: ³ — "The mortgage, when drawn up, was intrusted to the mortgagor, and he must be regarded as the agent of the mortgagee, so far as any directions were given by him as to its record." The request was "equivalent to a request that

¹ *McCourt v. Myers*, 8 Wis. 236.

² *Low v. Pettengill*, 12 N. H. 337.

³ *Ibid.* 339, 340

the mortgage should not be placed on record until further order. It could not be on the record, which is always public, and open to inspection, and yet 'be kept out of sight.' When recorded, it could only date from the new instructions. Such is the effect of the arrangement made by the parties. It is immaterial whether they understood the legal consequences of this arrangement or not. The notoriety contemplated by the statute in order to give validity to a mortgage, must exist. If by any arrangement between the parties to a mortgage and the recording officer, this design of the statute is defeated, the mortgage is invalid against those persons who had no cognizance of it. The attempt to obtain the benefits of a mortgage, and yet to defeat the requirement by which alone it can have its effect on the public, is a gross fraud, which is especially reprehensible if participated in by the recording officer." So, on March 22, 1845, A. mortgaged all his personal estate to B., as security against a liability for \$6,000. At the request of A., and in order to conceal his embarrassment, B. did not record the mortgage, but caused it to be repeatedly renewed, at intervals, usually, of twenty days, till June 4, 1846, when, being informed of the extent of A.'s indebtedness, for his security, he caused the last renewal to be recorded on the 18th of the same month on which it was executed. During this time, A. continued in possession, and no new consideration passed from B. to him after September 4, 1845. Held, in equity, upon a complaint to vacate the mortgage, as against creditors whose claims accrued after the last consideration passed, and before registration of the mortgage, such mortgage was invalid.¹

60. But, if a mortgage made in pursuance of a previous request of the mortgagee, and delivered by the mortgagor to the town clerk for registry, is followed by acts on the part of the mortgagee, assenting to and adopting the mortgage; such assent and adoption constitute sufficient evidence of a delivery of the mortgage, from the time when they take

¹ Gill v. Griffith, 2 Md. Ch. Dec. 270.

place, though the original mortgage is lost or destroyed in the clerk's office, after being recorded.¹

61. Mortgage of "materials now in my ship-yard," dated November 29, 1854, but recorded as dated March 29, 1854. The property was sold by the mortgagor July 16, 1855, and thereupon attached by the mortgagee. Held, the purchaser's title should prevail.²

61 *a*. Where a statute provides, that the clerk shall note on the book and the mortgage the time when it was received, and also that it shall be considered as recorded, when left as aforesaid with the clerk; the omission of the required noting of the time will not deprive the mortgagee of the protection of the record when made.³

62. Where an entry upon a mortgage of personal property was as follows: "Rec'd June 4, 1850, 6 o'clock forenoon, and recorded page 38, vol. 2, and examined by me, Wm. B. Crane, Town Clerk," and it appeared that the mortgagor and mortgagee both resided, at that time, in the town of D.; held, the entry was sufficient, *primâ facie*, to show the mortgage duly recorded in the town of D.⁴

63. A copy of a chattel mortgage, in which the amount claimed is misstated through an error of the copyist, is not a "true copy" within an act making all such mortgages void as against creditors, where no change of possession takes place, "unless true copies thereof shall be filed,"⁵ &c.

64. The certificate of a clerk is evidence of the registration of a mortgage;⁶ and such certificate on the mortgage, that it has been duly recorded, cannot be disproved, as against the mortgagee, by the production of a copy of the supposed record, differing materially from the mortgage. Thus a mortgage described the property, as "one span of large bay horses I bought of Chamberlain." The mortgage was certified to have been recorded by the town clerk; but the

¹ Thayer v. Stark, Law Rep. Vol. 5, No. 2, p. 101, (Mass. S. J. C. 1850.)

² Steelman v. Perkins, 42 Maine, 130.
McLarren v. Thompson, 19 Maine, 284

⁴ Fuller v. Rounceville, 11 Fost. 512.

⁵ Ely v. Caniley, 19 N. Y. (5 Smith) 496.

⁶ Anthony v. Butler, 13 Pet. 423;
Head v. Goodwin, 37 Maine, 181.

record was, "one share of a large bay horse I bought of Chamberlain." It appeared that the defendant, a sheriff who attached the horses upon a suit against the mortgagor, was previously informed that they were mortgaged, and examined the record for the purpose of ascertaining the fact; that he was told there must be a mistake, but designedly neglected to go to the plaintiff (the mortgagee) for information. Held, whether the discrepancy between the original mortgage and the record of it was sufficient to disprove the identity of the property, or not; it was not competent thus to disprove the certificate; the town clerk being a regular certifying officer, and his certificate, like the return of an officer, not liable to be impeached or controlled. The mortgagee relied upon it, and had good reason to rely upon it, as a valid security.¹

65. In New Hampshire, if the justice omits to sign the certificate of the oath required by statute, the mortgage, though recorded, is invalid against an attaching creditor, even with notice.²

66. A certificate need not state the book in which the registration is made.³

67. Where a statute required the mortgage to be sworn to, and that the certificate of the justice who administered the oath should be recorded with the mortgage, and it appeared that the oath had been administered, but the justice, through inadvertence, neglected to sign the certificate, and the mortgage, with the defective certificate, was thus recorded; held, it was invalid against a *bonâ fide* creditor, who attached the property, notwithstanding he had knowledge of the mortgage as it appeared upon the record.⁴

¹ Ames v. Phelps, 18 Pick. 314.

² Hill v. Gilman, 39 N. H. 88.

³ Head v. Goodwin, 37 Maine, 181.

⁴ Hill v. Gilman, 39 N. H. 88.

CHAPTER XLVII.

LIABILITY OF MORTGAGED PERSONAL PROPERTY FOR DEBTS.
MORTGAGE OF PROPERTY SUBJECT TO LEGAL PROCESS, AND
EFFECT THEREOF.

1. Distinction between personal and real property. Whether the mortgagor's interest is liable to be taken in execution.

14. Mode of selling mortgaged property on execution.

15. Statutory provisions in Massachusetts as to the attachment of mortgaged property; construction and application thereof.

24. Mode of stating an account and demanding payment by the mortgagee.

32. *Time of demanding payment, &c.; what is reasonable time.*

35. The statutes do not apply to an execution.

36. Effect of proceeding under the insolvent law, or of a receipt for property attached.

37. Statutes of other States.

43. Attachment of the mortgaged property *by the mortgagee*.

46. Of other property.

47. Mortgage of property attached.

1. *The liability of mortgaged personal property, to be taken for the debts of the owner*, is an important topic in this branch of the law. We have already considered at length (chapters 15, 37) the course of legislation and adjudication, by which an equity of redemption of real estate is subjected to attachment and execution, like a legal interest or title. As has been already suggested, no right remains in a mortgagor of personal property, precisely corresponding with an equity of redemption of real estate; it having been the prevailing doctrine, that the mortgagee of chattels is the *legal owner*, and that by breach of condition the mortgagor's title is absolutely forfeited. In harmony with this general principle, it has usually been held, that chattels subject to mortgage are not, independently of express statutory provision, liable to be attached or seized on execution, as the property of the mortgagor.¹ In the case of

¹ *Marsh v. Lawrence*, 4 Cow. 461; *Welch v. Whittemore*, 25 Maine, 86; *Melody v. Chandler*, 3 Fairf. 282; *Mattison v. Baucus*, 1 Comst. 295.

Haven *v.* Low,¹ Woodbury, J., says, (and this may perhaps be considered as the general rule, with the reasons upon which it rests):—"The equity of redemption is not the subject of attachment on execution. Most of the cases in the books relate to pawns, which were long confounded with mortgages of personal estate; but the principles which exempt the equity in both from seizure are similar. The analogy, also, to the equity of redemption in real estate is strong; for that was not liable to execution, either at common law, or by the 29th Charles II. And it is now liable in different States only by express statute, or by implication from other statutes, recognizing the equity of redemption in real estate as a legal, rather than equitable interest."

2. This rule, however, does not seem to have been adopted in all the States. Thus in New York it has been held, that, where mortgaged property is sold on execution, only the equity of redemption passes, if the mortgage is valid, and the purchaser has notice of it. Otherwise, where the mortgage is fraudulent, and the purchase made, adverse to the claim of the mortgagee.² So in later cases it is decided, that personal property mortgaged may be sold on execution against the mortgagor, more especially where he is rightfully in possession. The sheriff is not liable, and the purchaser takes, subject to the mortgage.³ Paige, J., says:⁴—"The sale could not affect or impair the rights of the mortgagee. His mortgages, notwithstanding the sale, remained liens on the property in the hands of the purchaser, at the execution sales. The proceeds of the sale go into the hands of the sheriff, to be applied by him on the executions, according to the priorities of their liens. The mortgagee can therefore have no right to direct what moneys, produced by the sale in this case, should be applied in payment of his mortgages, he not being legally entitled to any part of these moneys." So where, by the terms of a mortgage, payable

¹ 2 N. H. 16.

² White *v.* Cole, 24 Wend. 117.

³ Bank, &c. *v.* Crary, 1 Barb. 542.

⁴ Ibid. 551. Hull *v.* Carnley, 1 Kern, 501.

on demand, the goods remain in the hands of the mortgagor, and the mortgagee suffers the sheriff to seize them at the suit of another creditor, without notice, not making a demand of payment, he cannot maintain an action for taking them.¹

3. So, in Kentucky, a mortgagee cannot *replevy* the property from a sheriff, who takes it on execution from the mortgagor's possession, before a sale by the sheriff, although he threatens to sell it without reference to the mortgage.² Robinson, C. J., says :³ — "The equity of redemption *being liable to sale under the execution*, the sheriff had a legal right to take the property into his possession and hold it until after a sale according to law; and until after an illegal sale or some other tortious *act* making the officer a trespasser *ab initio*, the mortgagee can have no right to divest him of his possession. The mortgagee should wait until the sale, when, if the equity of redemption only shall have been sold, he will be entitled to restitution of possession from the sheriff; and if the absolute title shall have been illegally sold, he may replevy the property either as against the sheriff, before delivery to the purchaser, or as against the latter if he shall have taken it wrongfully into his possession." (*a*)

¹ *Livor v. Orser*, 5 Duer, 501.

² *Ibid*, 41, 42.

³ *Fugate v. Clarkson*, 2 B. Mon. 41; *Mercer v. Tinsley*, 14 B. Mon. 273.

(*a*) Where the equity of redemption of a mortgagor was levied upon, sold, and bought by A., and afterwards the property was levied upon and sold, under another execution, without regard to the mortgage, and A. purchased it at that sale, and the mortgagee replevied it; held, A. was not estopped from showing, on the trial of the right of property in replevin, that the mortgage was fraudulent. *Dedman v. Bridges*, 9 B. Mon. 474.

A. mortgaged to B. a slave and five horses, but sold three of the horses, and died. The mortgagee, who administered on A.'s estate, sold one of the horses to pay A.'s debts, and bought the other, which was sold on execution. Held, that a purchaser of the slave from A. might redeem; and, as B. might have held the horses under his mortgage, that the value of the two horses should be deducted from the mortgage debt, less the value of the equity of

4. So, in Wisconsin, the residuary interest of a mortgagor may be sold on execution; but, as the mortgagee after default has the right of possession against the mortgagor, so also he has the same right against the execution purchaser, who, by taking the goods without consent, will become a trespasser.¹

5. In Illinois, where a mortgage provides that the mortgagor is to hold the property until maturity of the notes, unless an attachment or execution is levied on it, an assignment of such mortgage, even without consideration, conveys all the rights of the mortgagee to the assignees, and any attachment or execution must be made, subject to these rights.²

6. In Alabama, when an execution is levied on mortgaged property, the mortgagee or his assignee may interpose a claim and try the right of property before the law-day of the mortgage.³ The interest of one who conveyed a slave, by

¹ Cotton v. Watkins, 6 Wis. 629.

² Beach v. Derby, 19 Ill. 617.

³ Floyd v. Morrow, 26 Ala. 353; Code, § 2595.

redemption in the one sold under execution. *Miles v. Blanton*, 3 Dana, 525.

In the same State, contrary, it would seem, to the prevailing rule, the interest of a mortgagee of personal property has also been held subject to legal process. Where two of the several owners of a steamboat had agreed that A., who furnished the engine for the boat, might take into his own possession and sell the boat to secure his debt, and pay the surplus to the owners, and delivered a bill of sale signed by themselves, but took it back for the purpose of procuring the signatures of the other owners; held, that A. had, as mortgagee, a beneficial interest in the boat, which might be attached by his creditors, who should have a foreclosure and sale of the interests of the two mortgagors. *Lyon v. Johnson*, 3 Dana, 544. See s. 9, n.

In Missouri, a mortgage of slaves was made June 18, 1838. June 11, 1839, the marshal sold the slaves, under a warrant of distress against the property of the mortgagor, which had been levied November 15, 1838. Held, there was no lien on the slaves, under the warrant, till an actual seizure; and that the mortgagee had a sufficient title to maintain an action for the conversion, after the day of redemption. *Dean v. Davis*, 12 Mis. 112.

bill of sale absolute on its face, as a mere security, may be sold on execution, and the sheriff may take possession.¹ (b)

7. In general, the recording of a mortgage protects the property from attachment by creditors of the mortgagor. But such registry, subsequent to an attachment or levy, will not have this effect.²

8. Notwithstanding these exceptions, the weight of authority would seem to be against the right of taking mortgaged property in execution. (c) Nor have the precise terms of the mortgage been held to make any difference in this respect.

9. Thus in Maine it is held, that a mortgagee may bring an action against the attaching officer, though the mortgage contain a provision that the mortgagor may retain possession, and sell the property to pay the debt.³ (d) After advert-
ing to the general principle, that the interest of a *lessee*

¹ *McConeghy v. McCaw*, 31 Ala. 447; Code, § 2455.

² *Stowe v. Meserve*, 13 N. H. 46.

³ *Melody v. Chandler*, 3 Fairf. 282.

(b) In Alabama, if chattels mortgaged are taken on execution, the mortgagee may either interpose a claim at law under the statute or proceed in equity. *Anderson v. Hooks*, 9 Ala. 704. Collier, C. J., says, (*Ibid.* 708, 709): — "It is competent for a mortgagee with a power to take possession of and sell personal property, upon the mortgagor's default, when the property is levied on after the forfeiture of the mortgage, to interpose a claim and try the right as the statute provides. Yet it by no means follows, that the mortgagee may not waive his legal right, and resort at once to a court of equity where all interests may be adjusted, and more ample justice dispensed. Although it is competent for a mortgagee to execute a power of sale contained in a mortgage, yet he is not bound thus to avail himself of his security. He may, if he prefer it, go into Chancery, and pray a foreclosure and sale, under the sanction of the Court. Where there is a cloud hanging over the title of land, which would prevent it from selling for a fair market value, Chancery frequently entertains suits to adjust the pretensions, or settle the priorities of conflicting claimants."

(c) In Mississippi, an equity of redemption in slaves is not subject to execution. *Commercial, &c. v. Waters*, 10 S. & M. 559.

(d) Property mortgaged cannot be attached as *the mortgagee's*, where it was agreed that the mortgagor should retain possession, and he is actually in possession. *Morton v. Hodgdon*, 32 Maine, 127. See s. 3, n.

is liable to be taken by his creditors, and the lessor can maintain no action, because he has parted with his title for the term; Parris, J., proceeds to remark:¹ — “O'Reilly does not stand in the relation of tenant or lessee to the plaintiff. There was no tenancy created, no lease executed or contemplated between the parties. O'Reilly had no interest in the goods except as mortgagor, and that was not attachable. Under his authority to the plaintiff to make sale, he acquired no rights in the property to be sold, either to its use or its proceeds. He is then to be considered as the agent or servant of the plaintiff, employed for a specific purpose, and invested with no other power than what is requisite to enable him to execute his agency. His possession of the chattels intrusted to him is the possession of his principal, and whenever that possession is unwarrantably interrupted to the injury of the owner, the law affords a remedy. The course pursued by the defendant in this case, if of any benefit to him, would wholly defeat the plaintiff's mortgage. He does not pretend that he can, under his attachment, hold anything more than O'Reilly's attachable interest. And what was that? As mortgagor, nothing. What other interest could he have? He was to account for all his sales until the mortgage was paid off. Now if the defendant could attach this right to make sale, this agency of O'Reilly's, what benefit would be derived from it? The authority to make sale of a quantity of goods would be acquired under a corresponding obligation to account for every dollar of the proceeds.” So, where the mortgage provided that the mortgagor should retain possession till breach of condition; but “if the same or any part thereof shall be attached at any time before payment by any other creditor or creditors of the mortgagor, then it shall be lawful for the mortgagee to take immediate possession of the whole of said granted property to his own use:” held, the mortgagee might maintain trespass against an officer, attaching in a suit against the mortgagor.² Ten-

¹ *Melody v. Chandler*, 3 Fairf. 284, 285.

² *Welch v. Whittemore*, 25 Maine, 86.

ney, J., says :¹ — “ By a mortgage of personal property without an agreement that it may remain with the mortgagor, the other party acquires the right of immediate possession; and if it be taken on mesne process, without first paying or tendering payment of the debt secured thereby, in favor of another creditor, against the mortgagor, such taking is a trespass upon the possession of the mortgagee. The right of immediate possession being in the mortgagee, in the absence of any agreement to the contrary, that right is limited no further than the intention of the parties, as manifested by the instrument, requires. The mortgage in this case being *bonâ fide*, the evident object of the parties thereto was to give to the plaintiff security for his debt, without depriving the debtor of the use of the property; but the ordinary right of a mortgagee to take possession of the property at pleasure, was not intended to be abridged by the interference of any other creditor. They could make such restrictions as they pleased; if the mortgage was silent on the subject of possession, the defendants would, on every principle, be liable to an action of trespass; can they be less so, when it was specially provided that such an attachment, at the time it should be made, should give the right to the plaintiff to take immediate possession? The attachment and this right were to be simultaneous. The law will not say that the attachment is legal, when it can give no right to the officer, who makes it, to hold possession of the property, and can create no lien for the security of the debt of the creditor. By the statute of this State, the distinction between actions of trespass and of trespass on the case is abolished.”

10. So, in New York, a mortgage of personal property provided, that the mortgagor should permit the mortgagee to “ have, possess, occupy and enjoy ” the property, whenever he should demand it. The mortgagor having absconded, the mortgagee took possession under the mortgage. Held, the mortgagor’s interest was not subject to be taken on execution, though the mortgage debt was not due at the time of

¹ Welch v. Whittemore, 25 Maine, 88, 89.

the levy. Gardiner, J., says : — “ The interest of the mortgagor was a right of redemption only, a mere chose in action, not the subject of levy and sale upon execution, unless united with a right to the possession for a definite period.”¹

11. In Massachusetts, where a mortgage was given to secure a note payable on time, with a proviso that the mortgagor might retain possession till default of payment, and, the day after the mortgage was made, a creditor of the mortgagor attached the property, not conformably to Stat. 1829, c. 124 ; held, the mortgagee might immediately bring an action on the case against the officer, and recover the value of the property, if it did not exceed the note, with all expenses of maintaining his title.² Putnam, J., says³ (in substance) : “ The creditors can be in no better condition than the debtor would be in regard to the plaintiff. If he would have had no right to sell before the time of payment, they would have no such right. Such an act on the part of the debtor might be considered as putting an end to the contract, and revesting a right of possession in the mortgagee. Or if these proceedings, being *in invitum*, would not have this effect, then the action of trespass on the case is the proper remedy for an injury to the plaintiff’s reversionary interest.” Adverting to the objection, that the plaintiff’s claim was not due at the commencement of the suit, and that it might be paid and the mortgage thereby satisfied when it should fall due, he proceeds to say : “ The answer is, that the plaintiff should be put in as good a situation as he was in when the property was thus taken away. The plaintiff would hold the money subject to the just claim of the mortgagor for an account. That would seem to be the just and equitable rule of the common law. But the legislature has provided by the statute ample remedy for the creditors. The act is predicated upon the confirmation of the contract between the mortgagor and mortgagee. If there should be any beneficial interest in the former remaining after paying the debt, it might be se-

¹ Mattison v. Baucus, 1 Comst. 295, 297. (Three Justices dissenting.)

² Forbes v. Parker, 16 Pick. 462.

³ Ib. 464, 465, 466.

cured by the process of foreign attachment, or by an attachment upon the property itself subject to the lien; in which latter case the Court might order and decree, that, on payment or tender of the debt to the mortgagee, the property should be delivered over to the officer. But the creditor has adopted a course which deprives the mortgagee of all benefit from his mortgage. He has caused the property to be attached and sold for his own security or payment, without making any provision for the payment of the debt due to the plaintiff."

12. The rule, that the owner of chattels, which he suffers to be mixed with those of another, must point out his own and demand them of an officer, who seizes the whole as the property of the other, before he can maintain an action against the officer; does not apply to the holder of a mortgage of all the personal property on certain premises, with a provision which he supposes to be valid, that it shall also cover all other personal property which the mortgagor may put on the premises in place of such as he should sell and deliver.¹

13. Personal property mortgaged is not liable to attachment in a suit against the mortgagor, merely upon the ground, that he purchased it with money fraudulently kept back from his creditors, upon the settlement of his estate as an insolvent debtor.²

14. In New York it has been held, that, where personal property consisting of several articles is sold on execution, subject to a mortgage, the whole should be sold together. And where the articles were at different places in the buildings and fields upon a farm, so that the whole could not readily be brought at once within the view of the sheriff; held, he ought first to make known and point out to the bidders the property to be sold, and might then sell the whole together, though it should not all be at once within his view.³ Bronson, C. J., says:⁴ — "The statute in relation to

¹ *Harding v. Coburn*, 12 Met. 333.

² *Codman v. Freeman*, 3 Cush. 306.

³ *Tift v. Barton*, 4 Denio, 171.

⁴ *Ibid.* 173, 174.

executions against property, provides that personal property shall be offered for sale in such lots and parcels as shall be calculated to bring the highest price. I do not see that this statute was violated. Although there were many kinds and parcels of property, the sale was made subject to the mortgage; and there was a necessity for selling the whole in one parcel. If it had been put up in several lots, it would not have been likely to bring anything; for unless one man purchased the whole, he would not acquire the equity of redemption; and one of several purchasers would have no remedy at law, if he would in equity, to compel other purchasers to contribute towards the satisfaction of the mortgage debts. The purchaser of part of the property would have no right to redeem *pro tanto*. The mortgagees could not be compelled to receive a part of their debt, and relinquish the lien as to a part of the property. When the sheriff sells personal property subject to a mortgage, the proper course is to sell the whole in one parcel."

15. The doubt, as to the liability of mortgaged personal property for the debts of the mortgagor, has been settled in some of the States by express statutory provisions that it shall be thus liable; the rights of the mortgagee being carefully protected by minute requirements as to payment of his debt, when stated and claimed by him. (*e*) With regard to the general policy of these statutes, it has been remarked:—"Inconvenience may sometimes arise, from extending the doctrine (that a right of redemption is liable to legal process) to personal property, particularly slaves. Although mortgaged to one person, they may be sold to several, who may be altogether careless of the interest of the mortgagee; and he may be compelled to guard his interest, in the hands of many, in whom he has no confidence, instead of one in

(*e*) See Appendix. These statutes are held not to apply to processes served by the United States Marshal. *Howe v. Freeman*, 14 Gray, 566. They are applicable, notwithstanding a provision for immediate possession of the mortgagee in case of attachment. *Wing v. Bishop*, 9 Gray, 223.

whom he had much. No distinction, however, is known to have been made, in this respect, between personal and real estate; and they have several times been determined to stand upon the same footing; and, although the rule may, sometimes, produce inconvenience to the mortgagee, yet, a contrary one would often produce much greater to other creditors. A man possessed of much personal property might mortgage it for greatly less than its value, to one or two creditors, postponing the day of payment a considerable time, and compel a multitude of others to resort to the slow and expensive course of suits in chancery; or, especially if their debts were small, cause them to sit down quietly under the loss."¹

16. In Massachusetts, prior to the enactment of now existing statutes, it was supposed that mortgaged property might be reached by creditors of the mortgagor, by means of *the trustee process*. But in the case of *Central, &c. v. Prentice*² it was held, that a trustee process could not be maintained against one having a mortgage, but not possession, of personal property; but that the property might be attached conformably to St. 1829, c. 124, whether the mortgagee had or had not possession. A statute (1844, c. 148) has since been passed, partly to obviate the effect of this decision, which provides that mortgaged property, in possession of the mortgagor, may be attached as if it were unincumbered, and the mortgagee or his assignees summoned as trustees. If, upon the answer of the trustee, or the verdict of a Jury, it appear that the mortgage is valid, the Court may order the plaintiff to pay the amount due upon it within a certain time; and, upon failure of payment or tender, the property shall be restored to the mortgagee. The plaintiff may have a trial by Jury, if he desire it. When the plaintiff makes the payment above provided, he shall be entitled to retain from the proceeds of the property attached the amount thus paid, and the balance shall be applied to his debt. If he does not pre-

¹ Per Taylor, J., *McGregor v. Hall*, 3 St. & P. 499.

² 18 Pick. 396. See *Kent v. Lee*, 9 Gray, 45.

vail in the suit, he may still hold the property till repaid the sum paid the mortgagee, with interest. (f)

17. In *Miller v. Baker*,¹ the question was suggested, whether since the statute, rendering it lawful to attach mortgaged property, taking precautions to secure the mortgagee's rights to the extent of his lien, the mortgagee could maintain trespass against the officer before giving notice of his mortgage and stating his account, and before a neglect or refusal of the creditor or sheriff to pay the demand and discharge the lien.

18. The question has been raised, whether the statute applies to a mortgage made for the purpose of *indemnifying* the mortgagee against liabilities incurred by him for the mortgagor.

19. In *Johnson v. Sumner*,² (g) Shaw, C. J., says: — "Had such been the condition of the mortgage," (to indemnify against liabilities,) "it is very doubtful whether the goods could be specifically attached by virtue of the Revised Statutes, chap. 90, sects. 78 and 79. All the provisions of this statute seem framed on the assumption, that the property stands pledged or mortgaged for the payment of money, and nothing more. The officer or attaching creditor, therefore, can discharge the lien by the payment of the money due; but the condition being to indemnify, or perform some other collateral act, there seems no mode indicated by which the condition can be performed. This is strengthened by another provision in Revised Statutes, chap. 109, regulating the trustee process. It is provided, sect. 25, that if the goods, in the hands of the person summoned, are mortgaged or pledged for the payment of any debt, the attaching creditor may pay or tender the amount due, and thereupon the trustee shall

¹ 20 Pick. 285.

² 1 Met. 176, 177.

(f) See Appendix.

(g) The point suggested in this case, that a statement of the *aggregate* amount due is insufficient, is said to be a mere *dictum*. Per Metcalf, J., *Hills v. Farrington*, 3 Allen, 428.

deliver the goods. And by sect. 26, if the goods, in such case, are held for any purpose other than to secure the payment of money, and the condition or thing to be performed is such as can be performed by the attaching creditor, the Court may make an order for the performance of it by him, and thereupon the trustee shall deliver the goods, &c. Taking both modes of attaching, and the statute provisions applicable to each, we are strongly inclined to the opinion, that when goods are mortgaged to secure the performance of any other obligation than the payment of money, the only mode of attaching the property is by summoning the mortgagee as trustee."

20. In *Haskell v. Gordon*,¹ it was held, that personal property, mortgaged to secure the mortgagee from all liabilities assumed by him for the mortgagor, "as indorser, joint promisor, surety, or otherwise, may be specifically attached, and the mortgagee cannot maintain an action against the officer, without stating an account and demanding payment, as in other cases. Dewey, J., (in substance) says:² — "By the Revised Statutes, &c., full authority is given for making an attachment of personal property that is subject to any mortgage. The right is in the first instance unqualified and without the performance of any precedent duty, but liable to be dissolved in case of failure to pay the mortgage debt within twenty-four hours after demand. There are undoubtedly great practical difficulties in carrying out fully the provisions of the statutes on this subject, in cases of mortgages with condition to indemnify against contingent future liabilities, or to secure the performance of future collateral acts; and these difficulties may be such, in peculiar cases, as to render it impossible for the creditor so far to comply with the duty devolving on him after a demand by the mortgagee, as will be effectual in retaining his attachment. The provisions for the transfer of the property to the custody of the officer, and furnishing the proper indemnity

¹ 3 Met. 268.

² *Ib.* 270-272.

to the mortgagee, as prescribed in cases of proceedings under the trustee process, are also more convenient and better adapted to this class of cases, than those in relation to proceedings by specific attachment. Rev. Stats. c. 109, sects. 25 and 26. On the other hand, there are serious objections to depriving the creditor of the remedy by specific attachment. The mortgagee may be insolvent, or without any fixed local habitation; or the equity of redemption may be about to expire." The statute, without qualification, authorizes an attachment, under which the property will be held, "until the mortgagee shall by his act place the attaching creditor in such a situation that he can no longer continue his attachment by reason of his failure to perform what the statute makes requisite, as a condition upon which alone he may retain the goods. The happening of such event is a contingency, the responsibility of which rests with the attaching creditor. There may be cases of mortgages given to secure against future and contingent liabilities, for which the mortgagees might receive a full indemnity, and yet leave the attaching creditor ample funds for his security. Suppose a mortgage of property of the value of \$500 to secure bail, or a receipt of personal property attached, where the demand did not exceed \$100. In such case, the creditor, after paying the mortgagee \$100, would acquire a lien of \$400. The mortgagee, in a case of this nature, may at least give notice of the existence of his mortgage, and demand the property. And although he cannot be required to give a more exact account of his claims than the case reasonably admits, he can state the general character of his demand, and the particulars of the extent of the lien, just so far as it may have assumed a certain and definite shape."

21. In the case of *Codman v. Freeman*,¹ Shaw, C. J., adverts to the doubts expressed by the Court in *Johnson v. Sumner*, (1 Met. 172,) whether personal property, mortgaged for any other duty or obligation than the payment of money,

¹ 3 Cush. 311.

could be attached except by the trustee process ; and to the case of *Haskell v. Gordon*,¹ as settling the question in favor of the right thus to attach, in case of a mortgage made to secure future and contingent liabilities. He says, (substantially,) "The notice to be given, and the demand made, by the mortgagee in such a case, must be adapted to a mortgage of this character, and to the actual rights and claims of the parties under it, at the time of the attachment. If, by the terms of the mortgage, no money is actually due to the mortgagee, no demand can be made for the payment of money ; and all that he can do is, to give the officer notice of the existence of the mortgage, with a schedule of the property, and an intimation that he claims to hold the property pursuant to the mortgage."

22. In construction of similar statutes in Maine it has been held,² that, if the right to redeem personal property was liable to attachment, the officer could not lawfully take possession of the property and withhold it from the mortgagee or his agent, without payment or tender of the mortgage debt. So, in *Wolfe v. Dorr*,³ the Court say : — "On the revision of the statutes, the language used in sections 38, 39, and 40, of c. 117, to reenact (a former statute) does not give the officer any additional rights. In this case he could not have lawfully taken possession of the goods conveyed in mortgage, and have withheld them from the possession of the mortgagees or their servant, the mortgagor, without a payment or tender of the mortgage debt."

23. The statute above referred to (chap. 117, sects. 38 and 39) provides, that personal property mortgaged or pledged may be attached, by tendering to the mortgagee, pledgee, or holder, the amount of the debt for which it is mortgaged or pledged, and when sold on execution the officer may apply the proceeds of the sale to the payment of the sum so paid or tendered. In construction of this statute it is held, that, if the property is not held by the attachment, there is no

¹ 3 Met. 268.

² 11 Shepl. 110.

³ *Paul v. Hayford*, 9 Shepl. 234 ;
Smith v. Smith, 11 Ib. 555.

power in the officer to make such application of the proceeds. The statute applies to cases where the property is attached by a creditor of the mortgagor or pledger, and is sold as such on the execution. The officer cannot keep property, which he had no authority to attach, and sell it on execution, merely to reimburse a creditor for what he has paid to discharge a lien upon it.¹

24. Many and nice questions have arisen in Massachusetts, in relation to the form and the time of the mortgagee's stating his account and demanding payment.

25. A demand may be signed by attorney, and may claim title under a pledge, as well as mortgage.²

26. Where a mortgage is made to two persons, to secure a gross sum to each, it is sufficient if the account state the gross sum due to each.³

27. A demand, not designating and identifying the articles, but merely describing them by the schedule annexed to the mortgage, and as the whole or a part of the goods attached by the officer in a certain house, will be sufficient, if the officer does not call for a more particular selection and specification, but persists in holding the property as the mortgagor's.⁴ Shaw, C. J., says:⁵ — "If the officer, in answer to the plaintiffs' demand; had professed his willingness to surrender the goods, and had called upon the plaintiffs to select and identify them more particularly, perhaps they would have been bound to do so. But the officer gave no such answer; on the contrary, he persisted in holding the whole of the goods, and denied the validity of the plaintiffs' title, and still denies it in this suit." So a mortgagee of goods of the value of \$1,500, which were attached, made the following demand upon the officer: "I have a mortgage on the goods and property which Addison Richardson has put in my keeping, to the amount of \$2,000 and interest. I hereby demand the same sum of you, to be paid within

¹ *Morton v. Hodgdon*, 32 Maine, 130.

² *Pettis v. Kellogg*, 7 Cush. 456.

³ *Housatonic, &c. v. Martin*, 1 Met.

⁴ *Codman v. Freeman*, 3 Cush. 306;

Averill v. Irish, 1 Gray, 251.

⁵ *Ib.* 312.

the time specified by law; as you have attached said property." Held, this demand and statement were sufficient, within the Revised Statutes, chap. 90, sect. 79, at least for the sum of \$2,000.¹ So, where goods pledged were attached as the pledger's, the pledgee gave to the officer an accurate written description of the notes secured by the pledge, and demand of payment, saying, the goods "are liable and mortgaged to me, and possession taken, for security of the following notes." Held, the demand was sufficient to cover all the goods.² So the following demand was made by a mortgagee of the attaching officer: "I hereby demand payment of, and indemnity for, the amount stated in the following account," describing six promissory notes. "All the above demands are now due and payable from said Rowell to me. I also demand of you indemnity for my liability, as indorser for the accommodation and benefit of said Rowell, of the following described notes of hand," describing them. "The foregoing demand is made on you, in consequence of an attachment made by you on a writ in favor of Gay & Stratton against Rowell, which property I claim to hold under two mortgages executed and delivered by said Rowell to me;" setting forth the dates of the mortgages, and the volumes and pages in which they were recorded in the registry. Held, a sufficient statement and demand under the statute.³ So the demand need not in terms allege a just and true account,⁴ nor deduct the value of other property mortgaged.⁵ So when mortgaged goods are attached, together with other goods of the mortgagor, with which they are intermingled, the mortgagee may maintain an action without pointing out the goods mortgaged, or specifying which of the goods are included in the mortgage. So, although he describes all the goods attached as included in the mortgage.⁶ So a demand, which describes the mortgage, and states the sum due thereon, and adds that the mortgagee will hold the attaching creditor

¹ *Jones v. Richardson*, 10 Met. 481.

² *Bowley v. Rice*, 10 Met. 7.

³ *Harding v. Coburn*, 12 Met. 333.

⁴ *Gassett v. Sanborn*, 8 Gray, 218.

⁵ *Rhode Island, &c. v. Danforth*, 14 Gray, 123.

⁶ *Averill v. Irish*, 1 Gray, 254.

responsible for the damages sustained by the detention of the property, is sufficient to sustain replevin for the property, or an action for damages.¹

28. But the burden of proof is on the plaintiff, to show that he delivered a just and true account.² And, in general, the statute requiring "a just and true account of the debt," if he claims more than is due, his demand will be ineffectual, unless the error resulted from accident or mistake, and unless the real amount of the debt exceeded the value of the property, so that the attaching creditor was not misled, and sustained no injury by the error.³ So a mortgagee cannot, after an attachment, sell part of the property, and apply the proceeds to the mortgage, and then demand payment of the balance.⁴ And no action lies, if a sum is included in the demand, which is not covered by the mortgage.⁵ So a written statement, from a mortgagee to the officer, setting forth that the mortgagor was indebted to him by note in a certain amount, with interest, referring to the town records for a description of the property, and forbidding him or any officer to touch it; was held an insufficient statement of account and demand of payment.⁶ So a demand upon the officer, stating the plaintiff's claim as "a mortgage of David Scott, Jr., to secure the payment of said Scott's note to me, given for one hundred and twelve dollars," &c., is not a sufficient compliance with the statute, as it fails to state the amount then due upon the note.⁷ So the mortgagee of property, attached by a creditor of the mortgagor, delivered to the officer the following writing: "This certifies that (the mortgagor) is indebted to me by note to the amount of \$981 and interest; and that as security I hold property in his possession, which appears in the town records of Gloucester; a mortgage dated February 23d, 1835; also property recorded February 3d, 1838; for this reason I forbid you or any other

¹ *Molineux v. Coburn*, 6 Gray, 124.

² *Hills v. Farrington*, 3 Allen, 427.

³ *Rowley v. Rice*, 10 Met. 7; *Harding v. Coburn*, 12 Met. 333.

⁴ *Hills v. Farrington*, 3 Allen, 427; Gen. Sts. c. 123, s. 63.

⁵ *Granger v. Kellogg*, 3 Gray, 490.

⁶ *Moriarty v. Lovejoy*, 23 Pick. 321.

⁷ *Sprague v. Branch*, 3 Cush. 575.

officer from touching said property." Held, this was not a sufficient statement of an account, nor demand of payment, because it did not particularly describe the property, nor state that it was the same then attached and in the officer's hands, nor expressly or impliedly demand payment of any sum due on the mortgage.¹ So, in case of two attachments upon mortgaged property, the mortgagee cannot maintain an action against the officer, if his demand of payment was limited to one.²

29. If two mortgages are made by and to the same person, but of different articles, and for distinct claims, and all the property is attached in a suit against the mortgagor; a sufficient statement and demand as to one mortgage will avail as to that, though insufficient as to the other.³ Wilde, J., says: ⁴—"The demands are distinct, and the defendant and the attaching creditor would have had the right to tender the amount due on the mortgage on which the plaintiff had a verdict, without any regard to the debt due on the other mortgage; so that the uncertainty as to what property was conveyed by one mortgage, and what by the other, could have been of no consequence; for if the defendant had tendered the amount correctly stated, no action could be maintained against him for any part of the property."

30. Where a balance due upon a note is the debt for which the goods are liable, the mortgagee may state in his account the single sum to which the debt is reduced. But where the condition is to secure several demands described in general terms, a statement of the result, composed of the aggregate of several distinct demands, has been held not to be a just and true account.⁵

31. The mortgagee may include interest in such account; and an understatement of the amount of interest does not render his account untrue, if his securities are not in his own hands, or he has not the means of exactly computing the interest.⁶

¹ *Moriarty v. Lovejoy*, 23 Pick. 321. But see *Hills v. Farrington*, 3 Allen,

² *Macomber v. Baker*, 3 Allen, 241. 428.

³ *Simonds v. Parker*, 3 Met. 144.

⁴ *Ib.* 146.

⁵ *Ibid.* See *Gassett v. Sanborn*, 8 Gray, 218; *Duncklee v. Gay*, 39 N. H.

⁶ *Johnson v. Sumner*, 1 Met. 172. 292.

32. The *reasonable time*, within which a mortgagee is to state his account, has been held to vary according to the circumstances of each case.¹ With regard to this particular point, it is held, generally, that a mortgagee in possession cannot maintain trespass against the attaching officer, unless the latter keeps possession for an unreasonable time, and thus becomes a trespasser *ab initio*.²

33. Where mortgaged goods were sold upon the writ, by consent; held, the mortgagee, even if he had notice, was not bound to make his demand and statement before the sale, and that, being made thirteen days after the sale, it was within a reasonable time.³ So a mortgagee, immediately after the attachment, made an informal and ineffectual demand and statement, and brought his action against the officer, which he prosecuted thirteen months, and became nonsuit. Fourteen days before the nonsuit, he delivered to the officer a just and true account, and demanded payment. Held, the last demand was under the circumstances made in reasonable time.⁴ So, where goods subject to two mortgages were attached, and replevied by the first mortgagee, and on trial the first mortgage adjudged void, and judgment rendered for a return; a demand and statement by the second mortgagee, made ten days after such judgment, was held to be within reasonable time, though more than two years after the attachment.⁵ Putnam, J., says:⁶ — “The mortgage, which was assigned to the plaintiffs, was made subject to the mortgage of Perry and others. If that had been confirmed, the plaintiffs would have included the amount which they would have been held to pay on that mortgage, in their claim as assignees of the second mortgage. The defendants knew of the suit which was pending between the prior mortgagees and the attaching officer, which, we have seen, was not decided until September, 1839. And the statement and demand were made upon

¹ Legate v. Potter, 1 Met. 325; Johnson v. Sumner, *Ib.* 172.

² Rowley v. Rice, 11 Met. 337.

³ Tapley v. Butterfield, 1 Met. 515.

⁴ Johnson v. Sumner, 1 Met. 172.

⁵ Housatonic, &c. v. Martin, 1 Met. 294.

⁶ *Ib.* 305.

the attaching officer immediately afterwards. There is no evidence which would justify an inference that the plaintiffs had any sinister views in withholding any information, and that they had any intent to take any course for the purpose of embarrassing the other party. The plaintiffs could not know, until after the decision of the case touching the first mortgage, whether or not they might legally demand or claim of the attaching officer the money which was secured by the first mortgage. And it is not contended that the plaintiffs were guilty of any laches after that case was decided." So, mortgaged goods were sold within a week after the attachment, by consent of parties. Before sale, the mortgagee gave notice of his claim to the officer, and forbade the sale. The officer replied, that he had seen the record of the mortgage and knew all about it. About four months afterwards, the mortgagee demanded of the officer and creditor payment of the amount of his claim, and delivered to them a written account of such claim. Held, upon their refusal to pay it, an action of trover would lie against them.¹ It was contended, that the demand upon the officer must in all cases be made before the property has passed from his hands, because the statute provides that "the property shall be restored" to the mortgagee. But the Court held, that such an inflexible rule would sometimes operate harshly upon a mortgagee, who had acted in good faith and in ignorance of any attachment; and that the duty of making the demand before the sale must therefore depend upon the time that elapses between the attachment and sale, and the other circumstances of the case. Dewey, J., says:² — "What is reasonable diligence will depend, in some degree, upon the circumstances peculiar to each case. While, on the one hand, early knowledge, on the part of the mortgagee, that the property has been attached, will require more speedy assertion of his rights; so, on the other hand, if the attaching creditor, or the officer, has, through the mortgagee, though informally, actual knowledge of the mortgage, and the nature

¹ *Legate v. Potter*, 1 Met. 325.

² *Ib.* 326, 327, 328.

and extent of the lien acquired thereby, this fact will be entitled to some consideration on the question whether the mortgagee has lost his lien by unreasonable delay in making that formal demand and statement of his claim which the statute requires. In the case at bar, the demand required by the statute was made a little more than four months after the attachment; but it had been preceded, at a very early day, by substantial notice of the claim, certainly quite enough to put the other party on inquiry, and to save the mortgagee from the imputation of intentional concealment."

34. But, under the Rev. Stats. c. 90, § 79, a demand by a mortgagee of goods, upon an officer or creditor who has seized them for the debt of the mortgagor, if not made until ten months after such seizure, and if no good cause is shown for the delay, is not made within a reasonable time, and will not give the mortgagee a right of action against the officer.¹

35. The provision of the Revised Statutes, c. 90, § 78, authorizing the attachment of personal property, subject to mortgage, pledge, or other lien, does not apply to a seizure on *execution*.² The Court say:³—"The language of the statute is appropriate to an attachment on mesne process, but not to a seizure or taking on execution. The language of the Stat. 1829, c. 124, § 2, was broader, and made it lawful to attach or take in execution such property. But the latter provision is omitted in the revised statutes, the language and provisions of which are particularly adapted to the case of attachment. This is strengthened by the additional acts of 1843, c. 72, § 3, and 1844, c. 148. The directions and provisions of these clearly assume, that the attachment is on a writ, in a suit pending in court, and obviously refer to an attachment on mesne process alone. But a creditor, in such case, is not without remedy. The case supposes that he has obtained judgment, but has no property attached to satisfy his execution. In that case, he may have an action of debt on his judgment, and may attach mortgaged

¹ Brackett v. Bullard, 12 Met. 308.

² Ibid. Lyon v. Coburn, 1 Cush. 278.

³ Ibid. 279.

property ; or he may have a trustee process, and summon the mortgagee as trustee."

36. The question has arisen, how far the claim of a mortgagee against the officer is affected by proceedings of the mortgagor under *the insolvent law*, subsequent to the attachment. Thus, mortgaged property having been attached, and the mortgagee having made the legal demand and given the legal notice ; the attachment was dissolved by proceedings under the insolvent law, but the officer proceeded to seize and sell the property upon an execution. In an action of trespass against the officer, held, the plaintiff should recover the value of the property when taken, whether the assignee had claimed it or not.¹ Shaw, C. J., says :² — "By the proceedings in insolvency, the attachments were wholly dissolved ; the attaching creditors no longer had any lien upon the goods, or other interest in them ; and, therefore, when the goods were taken on execution, those creditors were strangers, and had no right whatever to the property, or to the surplus, after the claim of the present plaintiffs was satisfied. On the contrary, subject to the plaintiff's mortgage, the general property and the right to redeem vested in the assignee, and he alone became entitled to the surplus ; and it makes no difference, in this suit, whether the assignee, under these proceedings, claimed the property or not ; it was his duty to claim it ; the lien created by the attachment was dissolved, and the interest of the officer created by such attachment divested ; and the attaching officer and creditors were strangers." (*h*)

37. Statutes similar to those in Massachusetts have been

¹ Codman v. Freeman, 2 Cush. 306.

² Ibid 313.

(*h*) If mortgaged goods, left in possession of the mortgagor, are attached as his, *received for* and redelivered to him, and subsequently taken possession of by the mortgagee for the purpose of foreclosure, and the mortgagor releases to him his right of redemption before judgment in the suit ; the officer is still liable on his receipt. Wentworth v. Leonard, 4 Cush. 414.

passed in some other States, (i) and received judicial construction.

38. It has been held in Maine, that a mortgagee may maintain trespass against an officer attaching the property upon a writ against the mortgagor, without first giving notice to the officer of his claim, or stating an account of the mortgage debt, and without any neglect or refusal of the officer to pay the debt or discharge the lien. Under Stat. 1835, c. 188, it is the officer's duty first to make his demand in writing.¹ Weston, C. J., makes a distinction between the laws of Maine and Massachusetts upon this point. He remarks:²—"The defendant has cited *Miller v. Baker*, 20 Pick. 285. The Court do not decide this point, but if they had, it depends upon a provision in the statute of Massachusetts, which is not to be found in our statute. It is there provided, that the mortgagee shall furnish to the officer, in writing, a true and just account of the amount, for which the property is mortgaged. By our statute of 1835, c. 188, § 3, the mortgagee is bound to do this, upon a demand in writing being first made upon him; and by the second section, the extinguishment of the lien is made a condition precedent to the attachment of the property, for the benefit of the creditor. By the same section, without such previous payment, the officer might sell the debtor's right to redeem; but here he sold and delivered the property itself, without any saving of the rights of the mortgagee."

39. In New Hampshire, where a demand for an account of the sums due on a mortgage was addressed to all the mortgagees, but served on only one, an account by him alone was held sufficient.³ So an account, which stated the dates and amounts of the mortgage notes, and other sums due from the mortgagor, but not legally secured by the mort-

¹ *Cutter v. Copeland*, 6 Shepl. 127.

³ *Belknap v. Wendell*, 1 Fost. 175.

² *Ibid.* 131.

gage.¹ Gilchrist, J., says:² — “If the account be erroneous, it contains, in itself, enough to show in what particulars errors have been committed. If the interest is not correctly cast; if the charges for the mortgage and for recording, and the sum of \$500, stated as before advanced, are not due upon the mortgage, the enumeration of them does not mislead any one. It was not the intention of the statute, that such an account should be *omni exceptione major*, but only that a reasonable degree of accuracy should be required.”

40. Under the provisions of c. 184, §§ 15 and 16, of the Rev. Sts., where a mortgage, and the notes secured thereby, have been assigned by the mortgagee as collateral security for a debt; a demand upon the assignee for “an account, under oath, of the amount of the debt or debts, demand ~~or~~ demands, secured by the mortgage,” is sufficient. But an account, in such case, of the amount of the debt for which the mortgage and notes are held as collateral, is not such a compliance with the statute as will defeat an attachment of the property.³

41. A mortgagee, who renders a true account of the debts and the amount thereof, actually secured to him, at the request of the officer, is not guilty of rendering a false account, and subjected to the loss of his security, because some portion or the whole of his debts, or the evidence of their existence, may be in some respects incorrectly described in the condition of his mortgage.⁴

42. An attachment issued by a Justice of the Peace, in New York, founded on an affidavit not sufficient to confer jurisdiction, is no bar to an action by a mortgagee against the plaintiff, for the taking of the property; and want of possession by the mortgagee is no defence to such action.⁵ Nelson, C. J., says:⁶ — “As between the mortgagor and mortgagee, the mortgage was a valid security, and vested the property in the mortgagee; and then the affidavit being admitted

¹ *Belknap v. Wendell*, 1 Fost. 175.

² *Ibid.* 185.

Calmore v. Gale, 33 N. H. 110.

⁴ *Melvin v. Fellows*, 33 N. H. 401.

⁵ *Halsey v. Christie*, 21 Wend. 9.

⁶ *Ibid.* 10.

to be defective, the Justice had not jurisdiction to issue an attachment which would enable a party suing out the same to take the usual ground in these cases, to wit, that the mortgage was executed in fraud of creditors."

43. It has been already seen, (ch. 15,) that a mortgagee of real estate cannot attach or levy upon the equity of redemption, in a suit upon the mortgage debt. But the Court in Massachusetts have adopted a different doctrine in relation to personal property. They hold, that a mortgagee of personal property may waive his claim under the mortgage, and attach the mortgaged property in a suit upon the mortgage debt, without violating any of the mortgagor's rights, or exposing him to any greater loss in consequence of such attachment. The principle, settled in the case of *Atkins v. Sawyer*,¹ has never been extended to mortgages of personal property. Whether the pledge must be returned, if in the actual possession of the mortgagee, before the attachment is made, may be a doubtful point. But, where he has not such possession, he may proceed as above stated.² So, in Maine, in an action upon a note secured by mortgage of goods, it appeared that the mortgagees took possession for breach of condition, but before the time of redemption expired waived the mortgage and attached the goods. In this action, the defendant, the mortgagor, claims to set off the value of the goods, on the ground that the plaintiffs could not waive the mortgage after taking possession. Held, they might thus waive it, and the set-off should not be allowed.³

44. In general, the mortgagor will not lose his right to redeem, by the mortgagee's causing the property to be sold on execution for the mortgage debt.⁴ But where a mortgagor undertook fraudulently to remove the property out of the State, and the mortgagee recovered judgment and execution upon an attachment against him for that cause, as an

¹ Pick. 351.

² *Buck v. Ingersoll*, 11 Met. 231, Rep. June, 1850, p. 89.

232.

³ *Libby v. Cushman*, (Maine,) Law

⁴ *Dabney v. Green*, 4 Hen. & M. 101.

absconding debtor, and had the property sold thereon; held, the mortgagor should not be permitted to redeem.¹

45. The mortgagee does not necessarily forfeit his claim under the mortgage, by attempting to seize the goods under legal process. Thus, the plaintiff having indorsed a note at a bank, made by A., for A.'s benefit, A. mortgaged certain goods to the plaintiff for his security, which the plaintiff took into his possession. The defendant, an officer, then attached these goods, in a suit brought by D., a creditor of A., and took them out of the plaintiff's possession, and afterwards sold them at auction. The note having become the property of the bank, the plaintiff caused a suit to be brought thereon, in the name of the bank, against A., and directed the defendant to attach the same goods, subject to the former attachment. In a suit for taking the goods, on such former attachment; held, the conduct of the plaintiff did not affect his right under his mortgage.²

46. A mortgage is not affected by attachment of property in a suit upon the mortgage note.³

47. While, as has been seen, mortgaged property may be taken by legal process, it is equally true that property subject to the lien created by such process may be mortgaged, and the mortgagee will take in subordination to the lien. The following miscellaneous points have been decided, in relation to personal property which is subject to the twofold lien of mortgage and attachment.

48. Where goods are mortgaged after they are attached, and the mortgagor dies before they are taken in execution, and his administrator receives them from the officer on paying him his fees and charges (agreeably to the (Mass.) Rev. Stats. chap. 90, sect. 106,) the mortgagee is entitled to possession under his mortgage, and may maintain an action for them against the administrator after demand, without paying or tendering the amount of such fees and charges.⁴ Shaw, C. J., says: ⁵ — "When the administrator paid the ex-

¹ Dabney v. Green, 4 Hen. & M. 161.

² Dyer v. Cady, 20 Conn. 563.

³ Thurber v. Jewett, 3 Mich. 295.

⁴ Parsons v. Merrill, 5 Met. 356.

⁵ Ibid. 359, 360.

penses to the attaching officer, and took the goods into his own possession, for the purpose of administration, as he might by Rev. Stats. chap. 90, sect. 106, he still held them subject to the valid mortgage. He had a right to hold the goods, subject to such mortgage, and if they had been of greater value, than the amount for which they were mortgaged, it would have been for the benefit of the estate that he should do so. It was a right to redeem, for the benefit of the general creditors, and to take the goods from the attaching officer, for that purpose, on payment of the fees; but he could not defeat or set aside the mortgage. No doubt the general object of the statute was to defeat that particular attachment, and to bring the attached property into the general fund, as assets, and thus secure a more equitable distribution; and this will be the result, when there is no conveyance or mortgage, subsequent to the attachment, or when the attached property exceeds in value the amount for which it is mortgaged. This precise case was not probably in the contemplation of the legislature; but we think it comes within the statute provisions, which, in their general operation, are beneficial. The administrator, in paying such expenses," (the officer's fees,) "is presumed to act for the benefit of the estate, either because he is ignorant of the mortgage, or under a belief that the right of redeeming was of value to the estate, or intending to contest the validity of the mortgage. He was under no obligation to do it, and the fact of doing it shows, in the absence of other proof, that it was done for the estate; and here is no proof that it was done at the request or for the benefit of the mortgagee. We can perceive no ground on which their reimbursement can be held to be a condition precedent to maintaining the action."

49. When the owner of goods attached mortgages them, giving notice to the officer, and the mortgage is duly recorded; the title vests in the mortgagee, subject to the attachment; and, if the goods are sold upon the writ, under chapter 90 of the Revised Statutes, and the action after-

wards entered "neither party," the proceeds of sale in the officer's hands belong to the mortgagee.¹ It is said by the Court:²—"It has been repeatedly decided, and the point cannot now be called in question in this Commonwealth, that property under attachment may be sold by the general owner, and a good title be given to the purchaser, subject only to the lien created by the attachment. Perhaps, upon considerations of policy, it might better have been decided otherwise, but it is now too late to question it. It is founded on the great principle, lying at the foundation of the right of property, that general ownership carries with it a full power of disposition; and when such ownership is not taken away, but only limited, as in case of a lien, the power of disposing still remains, subject only to the lien. But the same decisions which show this right prove that it cannot be fully carried into effect, without an actual delivery, that is, a change of custody; because the custody of such property is always in the attaching officer, to preserve the lien. A constructive delivery is sufficient. But when property is in the custody of a third person for a special purpose, and a sale otherwise valid is made, notice to the person in possession is a good delivery, even though that person has a lien on the property. By the mortgage, the plaintiff acquired property in the horse, subject to the attachment. The attaching creditor having failed to prosecute his suit and recover judgment, his attachment was dissolved. The plaintiff then being owner of the horse, free of the lien, the right of possession followed the right of property; and it seems, therefore, that the officer having had notice of the mortgage, after demand and time enough for inquiry, if he had failed to deliver the horse to the plaintiff it would be a conversion. But the horse could not be demanded, because in the mean time the officer had sold him, as by law, he rightfully might. Rev. Stats. chap. 90, sect. 57. What is the object of this statute? Not to alter the rights of parties, but to substitute, and place in the hands of the sheriff, imperishable money, requiring no

¹ *Appleton v. Bancroft*, 10 Met. 231.

² *Ibid.* 235-237.

expense to keep it, in place of perishable property, expensive to keep. Then the statute provides how the money shall be disposed of. 'And the proceeds of the sale, after deducting necessary charges, shall be held by the officer, subject to the attachment, &c., and shall be disposed of in like manner as, &c., if it had remained unsold.' This looks to the various contingencies, and directs the money to go as the property would have gone. If, as we suppose, on the dissolution of the attachment, the plaintiff would have been entitled to have the horse, he is entitled to have the money. The statute gives the right and creates the duty of the officer; and when a party has made himself liable for money, whether he has actually received it or not, this action will lie."

CHAPTER XLVIII.

ASSIGNMENT, PAYMENT, DISCHARGE, AND EXTINGUISHMENT OF
MORTGAGES OF PERSONAL PROPERTY.

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| 1. Assignment of a mortgage. | 21. Whether a mortgage is <i>merged</i> in other security for the same debt. |
| 9. Extinguishment of a mortgage; <i>payment.</i> | |
| 18. <i>Discharge or release.</i> | |
| | 24. <i>Waiver.</i> |

1. A MORTGAGE of personal property may be *assigned*; and substantially the same principles may in general be considered as applicable to the assignment of this class of mortgages, which have already been stated as governing the assignment of mortgages of real estate, with such variations, as naturally grow out of the distinctions between the modes of transferring real and personal property. It is said, that, although a chattel mortgage is not assignable or negotiable at law, yet an assignee thereof acquires rights in the claim secured and the property pledged, which courts of law as well as equity will recognize and protect.¹ (a) And a mortgagee of personal property may make an equitable assignment of his mortgage, which courts of law will take notice

¹ Zeiter v. Bowman, 6 Barb. 133.

(a) Where a mortgagor leases the mortgaged property, pending a suit for foreclosure, taking a chattel mortgage to secure the rent, which is subsequently assigned; the assignee takes it subject to all the equities and legal infirmities which can attach to it by reason of the final decree in the suit, although not a party thereto. But he is not bound by any proceeding to compel the tenant to attorn to a receiver and pay rent to him, unless he has notice of the application, and an opportunity to be heard. So far as the claim of such assignee, under his chattel mortgage, is concerned, he stands in place of the assignor, and is entitled to be heard on an application for an order to appoint a receiver, and directing the tenant to attorn and pay rent to the receiver. Zeiter v. Bowman, 6 Barb. 133.

of and protect, by a delivery of the deed to the assignee, without writing, for a valuable consideration.¹

2. Upon the point, whether an assignment of the mortgage debt passes the mortgage also, it has been seen (*supra*, c. 11,) that somewhat different doctrines prevail in different States.

3. In New York, in case of a mortgage of chattels, the assignment of the debt has been held to pass the property mortgaged; so that a suit against a third person must be brought by the assignee.² Sutherland, J., says: ³ — “ A mortgage of either real or personal estate is but an accessory or incident of the debt, or the security which is given as the evidence of the debt. The assignment of the security passes the interest in the mortgage. The mortgage cannot exist as an independent debt. If by special agreement it does not accompany the security assigned, it is *ipso facto* extinguished, and ceases to be a subsisting demand. If the notes were assigned or endorsed before they became due, and before the mortgage was forfeited, the inchoate interest of the mortgagee must have passed with them. If the transfer of the notes was after they fell due, and subsequent to the forfeiture of the mortgage, then the assignment operated as a transfer of the interest of the mortgagee in the mortgaged chattel.”

4. Such action has been held to lie, without any delivery to the assignee. Thus, after a mortgage duly recorded, the mortgagor remaining in possession, the mortgagee assigned the mortgage, and the goods were afterwards attached as the mortgagor's. In an action of trespass against the officer by the assignee, held, the action would lie, though no delivery was made to the plaintiff.⁴

5. It has been seen in a former part of this work, (see c. 18,) that the question often arises, whether a particular transaction in relation to a mortgage of real property shall constitute *a discharge* or *an assignment* of such mortgage. The same point has sometimes occurred with reference to

¹ *Crain v. Paine*, 4 Cush. 483.

³ *Ibid.* 84.

² *Langdon v. Buel*, 9 Wend. 80.

⁴ *Shurtleiff v. Willard*, 19 Pick. 202.

mortgages of personal estate, and more particularly mortgages given for the purpose of *indemnity to sureties*. Thus, where a mortgage of indemnity, from the maker of a note to the sureties, was assigned by the mortgagees to the promisee for his security, he giving them a discharge under seal of their liability; held, the mortgage was invalid in the hands of the assignee.¹ Shepley, C. J., says: ² — “ They (the plaintiffs) could maintain no action against Hall & Turner (the mortgagees) founded upon those two notes. The liability of Hall & Turner to pay those notes had been by their release extinguished. Nothing had been paid upon them. Hall & Turner acquired by the mortgage from William G. Hall a conditional title to the goods, liable to be defeated by the termination or extinguishment of their liability to pay those notes. That title and no other could they convey to the plaintiffs. They did not attempt to convey any other. They only assigned the mortgage and the title to the goods, which they had acquired by it. There may be a difference of opinion, whether the title to real estate conveyed in mortgage, upon payment or discharge of the debt or liability secured by the mortgage after condition broken, would revest in the mortgagor without a reconveyance or release or cancellation of the mortgage. But although the title to personal property conveyed in mortgage, becomes absolute in the mortgagor, upon failure to perform the condition within the time limited and extended by the statute of this State, c. 125, s. 30; yet if the mortgagee or his assignee afterward accept payment of the debt, or discharge the liability secured by the mortgage, the title revests in the mortgagor, without a redelivery or resale, and without a cancellation of the mortgage.”

6. Where the assignee of a mortgage transfers it back to a prior holder, who is in possession of the mortgaged property, the transfer, though not in writing, is a release of the assignee's claim to the property.³

¹ *Sumner v. Batchelder*, 30 Maine, 35.

² *Ibid.* 39.

³ *Dean v. Millard*, 1 Rhode Island, 283.

6 *a*. Chattels mortgaged were sold on execution, subject to the mortgage, and the purchaser took an assignment of the mortgage. Held, no extinguishment.¹

7. If the mortgagee give up the property, the mortgagor agreeing, with surety, to sell it and pay over the proceeds to the mortgagee; to an action upon this agreement against the surety, it is no defence that the mortgage was assigned to him.²

8. In case of a fraudulent mortgage, if an assignee in insolvency, take possession, and file a bill in equity, with public notice, to prevent an assignment of the mortgage; his title shall prevail over that of a subsequent *bonâ fide* assignee of the note and mortgage, without notice.³

9. A mortgage of chattels, like a mortgage of real estate, may in various ways be *extinguished* or become *void and of no effect*. One of these modes is *payment of the debt*, for security of which the mortgage was given. Upon this subject it is held, that payment of the mortgage debt revests the title to the property in the mortgagor.⁴ More especially, where no time is fixed for payment, the title revests in the mortgagor on payment, without redelivery, resale, or cancelling of the mortgage.⁵ Wilde, J., says,⁶ in case of a mortgage, "the property would revest in the mortgagor on payment of the debt, without redelivery of the goods, or any resale, or the cancelling of the mortgage. I take this to be the rule of law, as well as of equity, in relation to a mortgage of goods and chattels. In respect to mortgages of real estate, after condition broken, the rule of law is different. (See c. 17.) In such case the legal estate will not revest in the mortgagor, without the aid of a court of equity. But in this case, if the assignment can be treated as a mortgage, the property would have revested in the mortgagor, even if it were a mortgage of real estate. No time was limited for the payment of the debt, and in such case the

¹ Brown v. Rich, Law Reg. Jan.

⁴ Harrison v. Hicks, 1 Port. 423.

1864, p. 188, N. Y. 40 Barb.

⁵ Parks v. Hall, 2 Pick. 206.

² Harper v. Neff, 6 M'L. 390.

⁶ Ib. 210, 211.

³ Bigelow v. Smith, 2 Allen, 264.

debt is to be paid in a reasonable time. Now, if the condition of a mortgage is strictly performed, the performance *ipso facto* discharges the mortgage, and the property immediately reverts in the mortgagor." So it is said, "if the condition be performed, or an offer made to perform it, at the time stipulated, not only *jus ad rem*, but *jus in re* will vest in the party who the contract provides shall become the proprietor of the thing."¹ So, if a mortgage is made for the delivery of goods on a certain day, and they are delivered and accepted after the day, the mortgage is discharged.² So a mortgage, to secure the mortgagee as an indorser or surety upon negotiable paper, is discharged by payment of the debt.³ And where a bill of sale of a slave, absolute on its face, and a note given for the hire, were given to indemnify the vendee, as surety for the owner, for six months, and it appeared that the owner had released the vendee by paying the amount for which he was liable, but not until the six months had elapsed; held, the bill of sale and the note should be cancelled.⁴

10. But it has been held in Kentucky, that a mere tender by the mortgagor does not authorize him to retake the property. His remedy is in equity.⁵ And the mortgagee has a right to recover the property till the whole debt is paid. Evidence of part-payment is immaterial.⁶ (*b*)

¹ Per Collier, C. J., *Sewall v. Henry*, 9 Ala. 34.

² *Butler v. Tufts*, 1 Shepl. 302.

³ *Franklin, &c. v. Pratt*, 31 Maine, 501.

⁴ *Ward v. Deering*, 4 Monr. 44.

⁵ *Boone v. Rains*, 7 Monr. 384.

⁶ *Morrison v. Judge*, 14 Ala. 182.

(*b*) The defendants sold to A. and B., in August, 1855, four billiard-tables, for \$1100. They took ten notes of \$100 each, payable one each month, and also a note of C., and a mortgage of the tables to secure the notes of A. and B., with an agreement, that, in default of payment of any of the notes, all the notes should be due, and the mortgage foreclosed. There was also a written agreement signed by the defendants, that, after \$300 of the notes had been paid, they would give a receipt in full for one table, and so continue till all was paid. In January, 1856, a paper was signed by the defendants and delivered to A. and B., stating that they had received from

11. Parol evidence of payment is admissible, though the mortgage is under seal.¹ (c)

12. Where a mortgage is given to secure the surety and indorser of a note made by the mortgagor, and such note, after being protested for non-payment, is paid out of the pro-

¹ *Flanders v. Barstow*, 6 Shepl. 357.

them \$275, for one billiard-table, "said table being one of the four tables included in a mortgage given by said (A. and B)."¹ A. and B. made no further payments till March, 1856, when the defendants foreclosed, sold at auction, and at the sale bought all the tables. The plaintiff succeeded to all the rights of A. and B., and in September, 1856, brought trover, after demand, for the one table. Held, the mortgage would not be extinguished by acceptance of the price of one table, nor *a fortiori* of a less sum, which would not constitute a legal consideration for a promise to release the security. *Clark v. Griffith*, 2 Bosw. 558.

Sums received from an execution on the mortgage must be credited in a suit on the note. *Earnest v. Nappier*, 19 Geo. 537.

Where the assignee of a mortgage purchases it in part with money furnished by the mortgagor, this is *pro tanto* a discharge. *M'Lemore v. Pinkston*, 31 Ala. 266.

(c) In connection with the subject of *payment*, the following case may be referred to, with reference to the operation of the statute of limitations upon mortgages of chattels and the mortgage debts.

A sealed mortgage of personal property was made, reciting an existing indebtedness of the mortgagor to the mortgagee for certain specified considerations, and also certain proposed future advances, and conveying the property as security therefor. The debt having become outlawed under the statute of limitations, unless saved by the mortgage; a suit was brought to recover it, and the mortgage was set up as a replication to a plea of the statute. The question considered by the Court was, whether the debt, being a book account, was assured by specialty given for it, witnessed by subscribing the debtor's name, within the meaning of a statute upon the subject. It was held by the Court of Errors (reversing the judgment of the Superior Court) that the replication was bad. The Court say: — "The debt due at the date of the instrument referred to was, in the judgment of law, paid and absolved by the transfer of the goods and chattels mentioned in it. As to the latter articles charged after the date of said instrument, more than seven years had elapsed before the date of the plaintiff's writ. How can it be said that these were assured by the same writing, called a specialty, when they were delivered afterwards." *Clark v. Bull*, 2 Root, 329, 332.

ceeds of a new note made by the mortgagor and indorsed by the mortgagees for that express purpose, the mortgage is not discharged, but continues in force, as a security for the second note. And in such case it is proper to show that the payment was not designed to extinguish the mortgage.¹ So a mortgage is not extinguished by taking a new one, after default, to secure a new note, slightly exceeding in amount the old one, which is given up.²

13. B. gave to A. his note, and mortgaged a slave to secure it. A. sued B. on the note, recovered judgment, and issued a *ca. sa.*, under which B., having been arrested, applied for the benefit of the Insolvent Debtors' Act. Pending B.'s application, the slave was sold as his property, under a junior *fi. fa.*, and thereupon A. seized the slave under his mortgage. B. was afterwards discharged under the Insolvent Debtors' Act. Held, that A.'s title to the slave, and right to seize him under the mortgage, was not affected by the arrest of B. and his subsequent discharge.³

14. A chattel was mortgaged and a record made. While the mortgagor was still in possession, the partner of the mortgagee became surety for the mortgagor, upon an agreement that the chattel might stand as security for his indemnity. The chattel was afterwards taken by the mortgagee, and the liability for which the partner had become bound was paid from the joint funds. The mortgage having been found void for fraud, held, the mortgagee had no right to retain the chattel for the indemnity of himself and partner.⁴

15. Possession of the property by the mortgagor, after the debt falls due, raises no presumption of payment, if the mortgagee never had possession. Otherwise, if he had possession and relinquished it after maturity of the debt.⁵

16. A mortgagee, in possession seven years, may recover the property of a stranger, whether the debt is paid or not.⁶

17. A mortgagee foreclosed, and sold the property. The

¹ Chapman v. Jenkins, 31 Barb. 164.

² Hill v. Beebe, 3 Kern. 556.

³ Hamilton v. Bredeman, 12 Rich. Law, (S. C.) 461.

⁴ Beeman v. Lawton, 37 Maine, 543.

⁵ Carpenter v. Bridges, 32 Miss. 265.

⁶ Bennett v. Williamson, 5 Jones, 307.

mortgagor afterwards went into insolvency, and his assignee recovered the value of the property from the mortgagee, upon the ground of fraud against creditors. Held, the mortgagee might maintain an action upon the mortgage notes.¹

18. A mortgage may also be *discharged* or *released*, as well as paid; and this either by a direct and express instrument, executed for the purpose, or by construction and implication of law, arising from other acts of the parties.

19. A mortgage of indemnity to sureties is discharged by the creditor's discharging the sureties.² So a mortgagee, having agreed with the mortgagor to discharge his incumbrance for the benefit of a purchaser, signed and sent to the mortgagor a written instrument, agreeing to discharge the mortgage and hold the purchaser harmless in relation to it. The mortgagor delivered this paper to the purchaser, who carried it to the town clerk's office where the mortgage was recorded; and the clerk made, signed and attested the following entry on the margin of the record: "This mortgage having been duly cancelled by the mortgagor, and an order for discharge given by the mortgagee, therefore, this record is made." Held, this was evidence, from which the Jury might infer a *bonâ fide* discharge of the mortgage.³

20. But where parties to a mortgage executed an agreement, which was indorsed thereupon, that, in case of a sale by the mortgagor of any of the property, the mortgagee should discharge all claim to that portion of it, upon receipt of the money therefor; held, this agreement was a conditional one, and did not authorize the mortgagor to defeat the mortgagee's title by a sale, unless the condition was performed by payment of the price to the latter.⁴

21. A question sometimes arises, as to the effect upon a mortgage of other security in the mortgagee's hands for the same debt; or of a change in the original form of the mort-

¹ Whitney v. Willard, 13 Gray, Nov. T., 1850, Law Rep., Aug. 1852, p. 225.

² Sumner v. Bachelder, 30 Maine, 35. ⁴ Whitney v. Heywood, Mass. S. J. C., Oct. T., 1850, Law Rep., July, 1852, p. 169.

³ Stowell v. Goodale, Mass. S. J. C.,

gage debt. It is held that a *judgment*, confessed by the mortgagor to the mortgagee for the mortgage debt, does not merge or extinguish the mortgage, where by agreement it is taken only as collateral.¹ Johnson, J., says :² — “ It may perhaps well be doubted whether the judgment was a security of a higher nature than the personal mortgage ; and even if it were, whether it would operate to extinguish the mortgage and divest the mortgagees of the title they had acquired under it. It will scarcely be contended that in case the notes in question had been secured by a mortgage upon real estate, a judgment upon them would have extinguished such mortgage. And yet a mortgage upon real estate is a mere security and incumbrance upon the land, and gives the mortgagee no title or estate therein whatever, whereas a personal mortgage is more than a mere security. It is a sale of the thing mortgaged, and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition. And if it be conceded that a judgment upon the original indebtedness would not extinguish a collateral security for its payment upon real estate, I do not see how it could divest a title to personal property acquired by purchase. A vested legal title, whether in real or personal property, is the highest of all securities ; certainly higher than the mere lien of a judgment upon land, or the right of a plaintiff to personal property acquired by levy under an execution. The debt is not yet satisfied. The notes may have been cancelled, but the debt was not, and until that is done, it seems to me that all mere collateral securities, whether upon real or personal property, should be allowed to stand ; especially titles to property acquired under instruments where the parties stand in the relation of vendor and purchaser without fraud. The rule that security of a higher nature extinguishes inferior securities will be found, I apprehend, only to apply to the state or condition of the debt itself. It has never been applied, and I think never should be, to the extinguishment of distinct collateral securi-

¹ Butler v. Miller, 1 Const. 496.

² Ib. 499, 500.

ties, whether superior or inferior in degree. These are to be cancelled by satisfaction of the debt or voluntary surrender alone." (*d*)

22. But where execution was issued upon the judgment and levied upon the chattels mortgaged, which were advertised for sale under it, and, after the same property was sold upon another execution against the mortgagor, the mortgagees moved the Supreme Court for an order directing the sheriff to apply the proceeds of the sale upon their execution; held, in an action of trover by the mortgagees against the sheriff, these acts were repugnant to any claim under the mortgage, and the plaintiffs could not prevail.¹ Johnson, J., says: ² — "When they voluntarily placed their execution in the hands of Reynolds, the deputy, with directions to him to levy upon this property and sell it, they certainly to that extent unequivocally consented to its being treated as Vanderpool's. And had they afterwards stood by and suffered it to be sold without objection, they would have been

¹ Butler v. Miller, 1 Comst. 497.

² Ibid. 502.

(*d*) In a previous hearing of the same case, Jewett, J., says, (1 Denio, 412): — "The judgment, which is a higher security than the notes and mortgage, or either of them, was between the same parties. It was, so far as the plaintiffs, the mortgagees, are concerned, for the same debt, and this appears upon the face of the securities. Does not the law presume that the judgment was taken in satisfaction of the original debt? I am of opinion that it does. But if such presumption cannot be indulged, do not the circumstances attending the transaction prove satisfactorily that it was the intent of the parties, originating in some cause, known and appreciated by them, to give and take a new security for the old one? I cannot persuade myself that they did not. The fact, that by the mortgage the payment of the debt due to the plaintiffs was postponed to the first of October, and did not include the debt due to Sickles; and the fact that the judgment was payable immediately, and included the debt to Sickles; that Vanderpool consented to an immediate execution, which was issued and levied upon all of the mortgaged property, being all that Vanderpool possessed which was liable to execution, and that, too, within a few days subsequent to the making the mortgage, forces me to the conclusion that the parties intended to substitute the bond and judgment for the notes and mortgage."

estopped forever from asserting their title or claim under the mortgage." The learned Judge proceeds to decide, that the mortgagees might revoke their assent to the sale at any time before it actually took place ; but, one of the plaintiffs having bid off a part of the property, and they having insisted that the money in the sheriff's hands should go first to satisfy their execution, and then moved the Court, as above stated ; they were precluded from asserting their title as mortgagees, though the application was denied.¹

23. Mortgage of machinery, owned in common by the mortgagor and another, to secure \$2500. The mortgagee assigned his mortgage to the firm of which he was a member, and the other owner sold his interest to the same firm. The mortgagor during his life used the machinery in manufacturing goods, which he sent to the firm, for sale on commission, they making advances thereupon. When he first sent such goods, the firm charged the \$2500 to him in their account, and upon forwarding it wrote to him that they should consider the mortgage in force, as collateral security. This charge was never withdrawn from the firm's account with the mortgagor, though they rendered accounts current semi-annually till his death, and the credits given to him amounted in all to \$74,000, the balance of each account, however, being against him. The mortgagor having died, his estate was represented insolvent, and his administrator sold at auction "all the right, title, and interest (he) had in the machinery" to a member of the firm, who stated at the sale that he had a valid mortgage thereon, upon which nothing had been paid. The firm afterwards presented their claim of \$2500 to the commissioners of insolvency. Held, it should not be allowed ; the mortgage being still in force, and not extinguished by being charged in the above account, and the auction sale having passed to the purchaser only an equity of redemption.²

24. A mortgage may be extinguished by acts or declarations of the mortgagee, showing a *waiver* of his rights under

¹ *Butler v. Miller*, 1 Comst. 503, 504. ² *Farnum v. Boutelle*, 13 Met. 159.

it. Thus where goods are mortgaged to secure a surety, who afterwards pays the debt, and takes a new mortgage of the same goods to secure him for such payment; he thereby waives all claim under the first mortgage.¹ So a surety, holding a mortgage of indemnity, assigned it to the payee of the note, and the mortgagor afterwards made a new mortgage to the plaintiff. The assignee brings a suit upon the note against the mortgagor and first mortgagee, and causes the goods to be sold on execution. Held, he thereby abandoned his mortgage lien; that the plaintiff might maintain trespass against him and the officer, and the measure of damages was the value of the plaintiff's right to redeem.² Richardson, C. J., says:³—"If Stowell intended to avail himself of the mortgage at all, he should have taken the proper course to entitle him to sell the goods, by giving notice to the mortgagor, and requesting him to redeem by paying the note. If the mortgagor had not, upon such notice, paid the note in a reasonable time, it seems that the goods might have been sold, and the proceeds applied in satisfaction of the note. But Stowell, by causing the goods to be sold by virtue of his execution, must now be considered as having waived all claims under the mortgage. It would be grossly unjust to let him set up the mortgage, after he has voluntarily caused the goods to be sold, and put it out of his power to restore them upon performance of the condition of the mortgage by this plaintiff. The plaintiff has never had possession of the goods, and can be held to account with the mortgagor only for the amount he may recover in this case. The only loss he has sustained through the injurious acts of the defendants, is the loss of the privilege of redeeming the goods. The value of that privilege is the measure of the damages." So, where one buys personal property subject to mortgage, nominally from the mortgagor, but really from the mortgagee, or with his concurrence and by his request; the latter will not be allowed to set up a

¹ Paul v. Hayford, 9 Shepl. 234.

² Kimball v. Marshall, 8 N. H. 291.

³ Ibid. 293, 294, 295.

title under his mortgage. In the case of *Skirving v. Neufville*,¹ property was conveyed, and a mortgage given back to secure the purchase-money. Afterwards, the mortgagor being unable to pay it, application was made to a third person, with the knowledge and by the desire of the mortgagee, who himself wrote to the party upon the subject, to buy a part of the property at an advanced price. He accordingly bought it and paid the price; but the receipts were expressed to be on account of the mortgage debt. Before the purchase was completed, the mortgagee expressed to the purchaser his perfect confidence in his fulfilling his engagements. Most of the property was delivered to the purchaser with the consent of the mortgagee, and a part of it by the mortgagee himself. The part remaining in the mortgagee's hands having been sold at a reduced price, and the mortgage debt therefore unsatisfied, the mortgagee claimed to hold the portion sold, and the purchaser filed a bill for a perpetual injunction against this claim. Held, the mortgagee was a party to the contract of purchase, and the property sold was discharged from the mortgage.

25. Where a statute provides, that a mortgagor shall not sell the property without the written consent of the mortgagee, if consent is given, but not indorsed or recorded as required by the statute, the sale is good against the mortgagee.² So, although the mortgage provide, that the mortgagor shall not sell the property without the written assent of the mortgagee; still a purchaser may establish a title by proving a subsequent verbal authority from the mortgagee to make a sale. As between the parties, it is suggested that the mortgage could not have been controlled in this way.³ And the doctrine of *waiver* has been applied to acts done after the mortgagee's title had become absolute by breach of condition. Thus in the case of *Barry v. Bennett*,⁴ where a purchaser from a mortgagor, in defence to an action of trover by the mortgagee, set up a prior mortgage, recited in the

¹ 2 Des. 194.

² *White, &c. v. West*, 46 Maine, 15.

³ *Shearer v. Babson*, 1 Allen, 486.

⁴ 7 Met. 360.

plaintiff's mortgage; the Court say:—"Rider's mortgage is shown to have been discharged. The notes which it was given to secure have been paid. To this, however, it is objected, that the payment was made after the conveyance by mortgage had become absolute, and so the property included in the mortgage had vested in the mortgagee, without the right of redemption. But, if thus vested, it may reasonably be inferred that the right to hold the property absolutely was waived by the mortgagee. The receiving from the mortgagor payment of the entire amount of the debt secured by the mortgage, after the time for redemption had expired, would, in reference to personal property mortgaged, well authorize a Jury to infer a waiver of the right to hold absolutely."

26. In case of waiver after a sale, the mortgagor may recover the excess received over the debt.¹

27. It is no waiver, nor defence to a claim of foreclosure, that the mortgagee verbally promised to remove an incumbrance on land conveyed to the mortgagor.²

28. Where the mortgagee of a horse, default being made, took possession, but it was mutually agreed that the day of payment or sale should be delayed, and that the mortgagor might use the property for a specified purpose at a specified time; and, the horse becoming lame, another horse was substituted: held, the mortgagee had a right to refuse delivering either horse on the demand of the mortgagor, not for the temporary purpose, but as general owner.³

¹ Thompson v. Moore, 36 Maine, 47.

³ Bell v. Shrieve, 14 Ill. 462.

² Rebards v. Cooper, 16 Ark. 288.

CHAPTER XLIX.

VOID AND VOIDABLE MORTGAGES OF PERSONAL PROPERTY.

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| 1. The same rules apply, generally, to real and personal property. | 7. Usury. |
| 2. What title is necessary in the mortgagor. | 9. Illegal consideration. |
| 5. Misrepresentation or concealment by the mortgagee. | 10 a. Fraud. |
| | 11. Fraud against the <i>bankrupt</i> and <i>insolvent</i> laws. |

1. A MORTGAGE of personal property does not differ, in most respects, with reference to the causes which render it void or voidable, from a mortgage of real estate. (See chapters 19, 20, 21.) Where a mortgage is void, the possession of the mortgagee is held a trespass as to creditors.¹

2. It is held, that one cannot make a valid mortgage of personal estate, unless he has at the time an actual title thereto. Thus, where a person contracts to purchase personal property, with an agreement that the title shall not vest in him till payment made or security given, and a part only of the property has been delivered, without such payment or security; he cannot make a valid mortgage of such property.²

3. But a mortgage is valid, though a third person be in possession under the mortgagor, and have a special property in the goods.³ Boyle, C. J., says: ⁴ — "This principle" (forbidding the assignment or transfer of a chose in action) "has never been extended to a case of this kind, where the person in possession holds professedly under the seller, and has none but a special property in the thing which is the subject of the sale or transfer; for it is a general rule of law,

¹ Delaware v. Ensign, 21 Barb. 85.

² Pettis v. Kellogg, S. J. C. Mass., Sept. 1851, Law Rep. Oct. 1851, p. 327, 7 Cush. 456. See Bank, &c. v.

Crary, 1 Barb. 542; Succession of Hickman, 13 La. An. 364.

³ McCalla v. Bullock, 2 Bibb, 288.

⁴ Ibid. 289.

that the general or absolute property of personal chattels draws to it the possession, insomuch that the owner may bring trespass or trover, although he has never had the actual possession."

4. It has been held, that if the bailee of a chattel, who has no authority as against the bailor to retain or dispose of it, mortgage it as security for his own debt, and the mortgagee take possession; the bailor may maintain trespass against him without a demand.¹

5. In case of personal property, as of real estate, a mortgage may be avoided, or postponed to other incumbrances, by any fraud, misrepresentation, or unlawful concealment on the part of the mortgagee, operating to deceive or mislead innocent third parties in relation to the title. (a) (See chap. 21.) As where he stands by, and witnesses a sale of the property, without disclosure of his incumbrance. Nor is his actual presence in all cases necessary, in order to defeat his title.²

6. But where, a mortgagor having sold the property, the mortgagee, upon being informed of it, said he cared nothing about the property, and did not want it; held, he might still assert his title under the mortgage.³ Parker, C. J., says⁴ he may thus claim: "There being no evidence of any consideration for it as a release, and the sale not having been made on the credit of it, if that might make any difference. It was a mere loose declaration, which cannot operate as an estoppel. It might have a tendency to show that the mort-

¹ *Stanley v. Gaylord*, 1 Cush. 536, son *v. Blanchard*, 4 Comst. 303. See *Wilde, J.*, dissenting. *Butler v. Miller*, 5 Denio, 159.

² *Irwin v. Morell*, Dudl. 72; *Thomp-* ³ *White v. Phelps*, 12 N. H. 382.

⁴ *Ib.* 384, 385.

(a) In the case of *Dewey v. Field*, (4 Met. 381,) which was a case of receipting for personal property attached; in a suit against a third person, by the true owner, who concealed his title, it was held by the Court, that such title could not be set up against the attaching creditor, inasmuch as the party had full knowledge of it at the time and failed to disclose it, and the creditor thereby lost the opportunity of attaching other property.

gage had been settled, and be used with other evidence to show that fact if alleged." (b) So it has been held, that, where a mortgage is duly recorded, the mortgagee does not waive his claim by being present at a sale of the property, and not disclosing such claim.¹

7. With regard to *usury*, as affecting a mortgage of personal property, it has been held that a provision, in the mortgage of *a slave*, that the mortgagee shall have the use of the slave, instead of receiving interest upon the debt, is not usurious, unless the value of such use exceeds the legal interest; nor even then, where the right is given, not in con-

¹ *Steele v. Adams*, 21 Ala. 534.

(b) The same principle was applied in the following case to declarations made by a *mortgagor* of personal property.

Replevin of a yoke of oxen, which had been attached as the property of one Clark, and delivered to the defendant for safe keeping by the attaching officer. It appeared that Morton, the plaintiff's intestate, was owner of the oxen, and mortgaged them to Clark, with an agreement that he might retain possession till the debt became due. They were afterwards attached as Morton's, and the attachment was released, upon his declaration to the attorney of the attaching creditor that they belonged to Clark, to whom he had sold them for a certain sum; that he was to have the temporary use of them, and was then to drive them to a farm of Clark's. The attorney in that suit was also the attorney in the suit upon which the oxen were attached as Clark's. Held, the plaintiff was not estopped from maintaining this suit by Morton's declarations above referred to. *Morton v. Hodgdon*, 32 Maine, 127. Wells, J., says, (Ib. 129): — "Before one can be conclusively bound by a declaration made in relation to his interest in property, such declaration must be designed to influence the conduct of the person to whom it is addressed, and must have that effect. Morton had no knowledge of any intention on the part of Jenness or his attorney to attach the oxen as the property of Clark, and could not therefore have designed to influence him in that respect. If it had been communicated to him, he might then have stated the existence of the mortgage, and the particular provisions of it." The declaration "is evidence to be weighed in connection with other testimony, and to have such force as it may deserve. Clark had a mortgage of the oxen, and by law his interest is not attachable, while the plaintiff had the possession and the right of redemption. The undisputed facts of the case outweigh the effect of the declaration."

sideration of the loan and forbearance, but by way of gift to the mortgagee of the increase.¹

8. It is also held that parol evidence is competent to disprove usury, though perhaps not to show that the mortgage was meant for a gift.²

8 *a*. Where a transfer of slaves was held to be a mortgage to secure a usurious loan, and not a bill of sale; held, the plaintiff, on being allowed to redeem, should be charged with the amount of the loan and legal interest, and the defendant with the hire of the slaves since he had possession, and the balance decreed upon this basis.³

9. A mortgage of chattels may undoubtedly be void for *illegal consideration*. Thus a mortgage given as security for notes, the consideration of which consists in part of spirituous liquors illegally sold, is wholly void.⁴ But a mortgage of intoxicating drinks, under which possession has been taken by the mortgagee, cannot be treated as void under a prohibitory liquor law, as between the mortgagor and mortgagee, nor as between the latter and the creditors of the former, unless made to defraud such creditors.⁵ And it has been held, that, where personal property is mortgaged to secure a claim rendered void by statute, and subsequently mortgaged to another person, to secure a lawful debt, and the former mortgagee receives the amount of his debt by a sale or discharge of the mortgage; he does not thereby become liable for such amount to the second mortgagee. Thus Wyatt & Son, keepers of the Cumberland Hotel in Portland, being indebted to the Bank of Cumberland, gave to the Bank three mortgages of the furniture and other personal property in the hotel. Having purchased of the defendant supplies, for a part of which they were indebted, and being also indebted to one Corey; in order to secure these debts they made a mortgage to the defendant and Corey, subject to the Bank mortgages. A part of the defendant's account was made, subse-

¹ Joyner v. Vincent, 4 Dev. & B. 512.
See Woodard v. Fitzpatrick, 9 Dana, 117.

² Joyner v. Vincent, 4 Dev. & B. 512.

³ Thompson v. Campbell, 6 Monr. 120.

⁴ Brigham v. Potter, 14 Gray, 522.

⁵ Bagg v. Jerome, 7 Mich. 145.

quent to the day when the act of 1846, chap. 205, "to restrain the sale of intoxicating drinks" took effect. That part of the account contained charges for spirituous liquors and wines. The defendant proved no license. Subsequent and subject to the mortgage made to Corey and the defendant, Wyatt & Son mortgaged to the plaintiffs to secure a debt due them. Wyatt & Son then assigned to Woodward the right to redeem all the mortgages. Upon the back of the mortgage to Corey and the defendant was an assignment to Woodward, who paid to the defendant the amount of the mortgage. The plaintiffs bring an action for money had and received against the defendant, to recover the amount of their mortgage. Held, the action could not be maintained.¹ Shepley, C. J., says:² — "Contracts made in violation of the provisions of a statute cannot be enforced in a court of justice, and may be effectually resisted, when introduced as evidence of title by a party to them, or by one in legal privity with such party, but not by a mere stranger, who would attempt to enforce the law and to disturb the rights secured to the parties by such a contract." The Chief Justice refers to the cases decided upon this point with reference to the objection of usury, and adds:³ "The statutes prohibiting the taking of unlawful interest, and the sale of intoxicating liquors, rest upon similar principles of legislation. The plaintiffs, as subsequent mortgagees, are alleged to come within the rule, which admits those in privity of title to show, that a contract between other parties was illegal. But the plaintiffs, by their mortgage, did not purchase or obtain a title to the entire property already mortgaged to others. Their mortgage declares, that it was 'made subject to said three mortgages and also to a mortgage,' &c. They therefore became the owners of the property, subject to those mortgages, and did not acquire the rights of Wyatt & Son to defeat the second mortgage. This would seem to be the aspect which the case would present, if it were admitted that the defendant

¹ *Lillsworth v. Mitchell*, 31 Maine, 247.

² *Ibid.* 249.

³ *Ibid.* 250, 251.

had received money on account of an illegal contract unexecuted. But the plaintiffs allege that the mortgage, to which the defendant was a party, has been paid and not purchased by Woodward. If so, that contract was perfectly executed and extinguished, before this suit was commenced ; and the plaintiffs do not present themselves as resisting a title obtained and insisted upon in violation of a statute, but as attempting to recover back money paid upon an executed illegal contract, and without having been the persons who made the payment. When a contract not *malum in se*, made in violation of the provisions of a statute, has been executed, a party, who has performed, by the payment of money, cannot recover it back, unless he can show, that it was not paid for value actually received, but was obtained wrongfully or by undue advantage ; or unless he can exhibit a statute provision expressly authorizing such a recovery."

10 *a.* Of course, *fraud* avoids a mortgage of personal as well as real property. But the *declarations* of a mortgagor, made after the filing of the mortgage, are incompetent to prove it fraudulent.¹

10 *b.* He who takes a mortgage of property, with knowledge of a fraudulent design of a mortgagor thereby to defeat or delay his creditors, is in law charged with a participation in the fraud, although he may pay a full consideration and take immediate possession. The transaction is *malâ fide*, and the conveyance to him is utterly void as to creditors.²

10 *c.* An intent, on the part of mortgagor and mortgagee, to defeat the creditors of the former in Georgia, will avoid the mortgage as against creditors and purchasers in Alabama.³

10 *d.* Where a chattel mortgage contains no unlawful provisions, it can only be avoided by proof of fraud in fact, which is exclusively a question for the jury. If it were void on its face, it would be the duty of the Court to pronounce it

¹ Donaldson *v.* Johnson, 2 Chand. 160.

² Robinson *v.* Holt, 39 N. H. 557.

³ Beall *v.* Williamson, 14 Ala. 55.

so; but the Court cannot look at facts outside the instrument and treat them, when found by the jury, as a part of the instrument itself, or instruct the jury, if they find such facts, that the mortgage is void. Thus, that a chattel mortgage is given to a trustee to secure demands in favor of several creditors, instead of being given to the creditors themselves, and that it contains a provision that the trustee shall be liable in the premises for his own default or neglect only, are matters which the jury may take into account in determining the question of actual fraud, but they do not render the instrument fraudulent in law.¹

10 *e*. A statute, which declares that conveyances and assignments of personal property, "made in trust for the use of the person making the same," shall be void as against creditors, has no application to trust mortgages made *bond fide* to raise money to pay creditors; although the surplus in such cases, after satisfying the mortgage debt, may, by way of resulting trust, or by express stipulation, be for the use of the mortgagor.²

10 *f*. A mortgage of property made by a citizen of one State, temporarily in another with such property, if valid by the law of the latter State, is valid in the former against the creditors of the mortgagor, who afterwards find the property in the former State in his possession.³

10 *g*. In trover against a sheriff, by parties claiming the property levied on by virtue of a chattel mortgage, a judgment in favor of the execution creditor must be alleged and proved, to authorize proof showing the mortgage fraudulent. And in such case, although the question of fraud was litigated in the court below, yet, as the notice appended to the plea did not aver a judgment, it will not be presumed that one was proved.⁴

11. A mortgage, though otherwise valid, may be void against creditors, by virtue of certain provisions of *bankrupt*

¹ *Bagg v. Jerome*, 7 Mich. 145.

² *Curtis v. Leavitt*, 17 Barb. 309.

³ *Langworthy v. Little*, 12 Cnsh. 109.

⁴ *Halsey v. Hillon*, 2 Mich. 355.

or *insolvent* laws. (c) Thus a trader conveyed all his stock, by way of security for all the money which the vendee should advance to him, but retained possession of the property. Held an illegal preference in fraud of the bankrupt laws, and therefore void.¹ Lord Mansfield says: ²—“All the acts concerning bankrupts are to be taken together, as making one system of law; they are all to be construed favorably for creditors, and to suppress fraud. By the express tenor of the deed, Slader was to have the absolute order and disposition as before. In fact, he was permitted to continue in possession, and *act as owner*. They who dealt with him, trusted to his visible trade and stock. They trusted to the bankrupt law, that he could neither have sold or mortgaged; and, in case of a misfortune, that his effects must be equally distributed. They were imposed upon by false appearances. The preference aimed at was fraudulent and unlawful. Such preference is a fraud upon the whole bankrupt law, and would defeat the two main objects it has in view; to wit, the *management* of the bankrupt's estate; and an *equal distribution* among his creditors.” So where notes were given to a creditor as collateral security, and the debtor became bankrupt on the following day; held, the assignment of the notes was void, and the assignee of the bankrupt might maintain trover for them; that the transfer, on general principles, would be valid, but was void as against the policy of the bankrupt law.³ Parker, J., says: ⁴—“The fact agreed, that the notes in question were transferred to the defendant *in contemplation of an act of bankruptcy*, appears to me to settle the case. It is true, upon general principles of law, that such a transaction would be good and valid. A creditor has a right to be vigilant, and to receive the benefit of his vigilance. But the policy of the bankrupt law is opposed to this preference of one creditor to another; and the statute

¹ *Worseley v. De Mattos*, 1 Burr. 467.

³ *Locke v. Winning*, 3 Mass. 325.

² 1 Burr. 474-476.

⁴ *Ibid.* 326.

interposes, and avoids what would otherwise be held an innocent, and perhaps sometimes a meritorious act. Where a debtor in failing circumstances invites a creditor to take security, or gives to a favorite creditor notice of his circumstances, in order that he may secure himself, contemplating bankruptcy; to support such a preference in a court of law, would be to destroy the very end and purpose of the bankrupt system." Sedgwick, J., says:¹—"If every attempt to defeat the public law is fraudulent and void; the delivery of property to a creditor in contemplation of bankruptcy is fraudulent, notwithstanding the delivery is made in satisfaction of a *bonâ fide* debt." And a mortgage of personal property, in contravention of the insolvent laws as to any part of the debt secured, is wholly void. As where a part of the debt is a preëxisting one, the securing of which is forbidden by those laws.²

14 *a.* Where a trader mortgages part of his property, the question under the bankrupt laws is, not whether the transfer will terminate his business, but whether it will render him insolvent.³ Thus a manufacturer mortgaged all his machinery, worth £1500, to secure bills drawn or to be drawn by him, accepted by his consignees, and discounted by the mortgagee; empowering the mortgagee after three days' notice, to enter, take possession, sell, and pay the expenses, and the bills then due or running, and the surplus to the mortgagors. The mortgagor had goods worth £1100, good claims worth £900, and owed £2900. Held, the mortgage did not prove an act of bankruptcy, though, if carried into effect, it would have stopped the business of the mortgagor.⁴

15. Mortgage, to secure a note payable in four years, of all the machinery in the factory of the mortgagors, with all the tools and implements belonging to the same, and all the tools and machinery for the use of the factory, which they might purchase within the four years. July 16, 1842, the mortgagee took possession of the property for breach of con-

¹ *Locke v. Winning*, 3 Mass. 328.

² *Denny v. Dana*, 2 Cush. 160.

³ *Young v. Ward*, 14 Eng. Law & Eq. 642.

⁴ *Ibid.*

dition, including some articles in the factory at the making of the mortgage, and some subsequently added. August 26, 1842, the mortgagors filed a petition under the bankrupt law, and were afterwards declared bankrupt. The assignee petitions the Court for authority to take possession of the property. Held, the mortgage, and the possession taken under it, constituted a lien, which was protected by the second section of the Bankrupt Act, as against creditors of the mortgagors.¹ Story, J., says:²—“The present is not a controversy between a first and second mortgagee, as to property acquired and *in esse* after the execution of the first mortgage, and before the time of the execution of the second mortgage, both the mortgagees being *bonâ fide* purchasers for a valuable consideration, and the second mortgagee having no notice of the prior incumbrance. Neither is this a controversy between a mortgagee of a thing in building, (as, for example, a ship in building,) before it is completed, and a subsequent attaching creditor, or a subsequent purchaser, after it is completed. The present is a question between the assignee of a bankrupt, acting for the benefit of all the creditors, and the mortgagee, claiming title under his mortgage; and it arises upon a petition, partaking of the character of a summary proceeding in equity. Assignees in bankruptcy take only such rights and interests as the bankrupt himself had; and, consequently, they are affected with all the equities which would affect the bankrupt himself, if he were asserting those rights and interests. Courts of Equity do not, like Courts of Law, confine themselves to the giving of effect to assignments of rights and interests, which are absolutely fixed and *in esse*. They support assignments not only of choses in action, but of contingent interests and expectancies; and also of things, which have no present actual or potential existence, but rest in mere possibility only. In respect to the latter, it is true that the assignment can have no positive operation to transfer, *in presenti*, prop-

¹ Mitchell v. Winslow, 2 Story, 630. ² Ibid. 636, 637, 639, 644, 645, 646, 647.

erty in things not *in esse* ; but it operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come *in esse* ; and it may be enforced as such a contract *in rem*, in equity. As to the possession and use of the property, and taking the rents and profits thereof, there is nothing in that part of the objection which will invalidate the mortgage. Where a mortgage or a lien is created on chattels by contract, it is entirely competent for the parties to agree, that the possession and use thereof shall be retained by the mortgagor until the breach of the condition, or by the debtor until the creditor shall assert his rights against it as a security for the debt. Even in cases of bankruptcy, a qualified possession of the property by the debtor will not oust the creditor of his rights, as leaving the property in the order and disposition of the debtor. Under the statute of Maine for the recording of mortgages of personal property, where the mortgage is recorded, it is valid without possession of the property mortgaged being delivered to the mortgagee ; and a stipulation that it shall remain in possession of the mortgagor until breach of the condition, has been upheld as within the true spirit and intendment of the act. Then, as to the supposed right of sale, of the stock in trade and other mortgaged property. That right, conceded by the mortgagee, is not inconsistent with the validity of the mortgage ; for, still the proceeds, or other equivalent property, may be substituted for it, and if the parties consent to such an arrangement, there seems no legal objection to it." In relation to the argument, that the mortgage was a virtual fraud upon other creditors and against the policy of the law, the learned Judge proceeds to remark : " I am not aware of any policy of the law, or of any principle of law, which makes any conveyance of this sort invalid as to creditors, if they have full notice, or may have full notice of it by the exercise of reasonable diligence. Besides ; the assignees here stand before the Court affected with all the equities of the original debtors, and the creditors

here assert their rights through and under the assignee and not by any paramount title."

16. Personal property, under mortgage, and in possession of the mortgagee, was attached by a creditor of the mortgagor, and taken into possession by the officer. The creditor then filed a petition in bankruptcy against the mortgagor, upon which he was decreed a bankrupt, and the officer appointed his assignee. The property was afterwards sold by the assignee, under a license of Court, and the proceeds distributed among creditors; and, upon petition of the assignee, the mortgage was declared void, as contrary to the bankrupt law, and ordered to be delivered up to the assignee to be cancelled. The mortgagee brings an action of trespass against the sheriff for making the attachment. Held, the action would lie, but the proceedings above stated might be shown, for the purpose of reducing the amount of the verdict to merely nominal damages.¹

17. Agreement, reciting that the plaintiff had discounted a bill for one Smith, who in consideration thereof deposited with the plaintiff, as a collateral security, the lease of his house, and assigned to him the fixtures, as per inventory; and containing a stipulation on the part of Smith, if the bill should be dishonored, to execute a mortgage to the plaintiff of the lease, with a power of immediate sale, together with the fixtures, such lease and fixtures to be sold by auction or otherwise, and, after repayment to the plaintiff of his debt and expenses, the balance to be paid over to Smith. But, if the plaintiff should wish to sell the lease and fixtures, he might do so on the premises, without subjecting himself to an action of trespass. Smith also undertook to pay all arrears of rent and taxes within three months; and, in default thereof, authorized the plaintiff to sell the lease and fixtures, on the premises, without previous mortgage, and to pay the proceeds as before stated. Smith signed a receipt for £80, as paid for purchase of the fixtures. Smith became bankrupt, having previously continued in possession, and the bill having

¹ Perry v. Chandler, 2 Cush. 237.

three weeks to run. The assignees took possession of the fixtures and sold them. Held, the assignees were liable to the plaintiff in trespass for the value of the fixtures, the agreement having vested in him an immediate title. Also, the fixtures having sold at auction for £36, which was a fair price on such sale, but being worth £80, if valued as between an outgoing and incoming tenant, the plaintiff was entitled to recover the latter sum.¹ Lord Denman, C. J., says:² — “The instrument looked at in the whole, amounts to an assignment of a present interest. The sale of the fixtures, separate from the house, was the act of the assignees, not of the plaintiff. They are not entitled to presume that the plaintiff would have sold in the same manner, or that he would not have sold them to the eventual purchaser of the term, which in the event of non-payment he would be entitled to do. He is therefore entitled to claim the full value which he would have realized if he had sold in this manner.” Patteson, J., says:³ — “The intention was to pass an immediate interest in the fixtures. This seems to me particularly evident from the last clause, which empowers the mortgagee to enter on the premises for the purpose of selling the fixtures without being liable to an action of trespass, plainly contemplating the property in the fixtures passing to the plaintiff while the legal interest in the house still remained in the bankrupt. As to the point of value, the assignee is not entitled to take advantage of his own proceeding in separating the fixtures from the house. According to ordinary experience, it was most probable they would be sold with it.”

¹ *Thompson v. Pettitt*, 10 Ad. & Ell. (N. S.) 101.

² *Ibid.* 105.

³ *Ibid.* 105, 106.

CHAPTER L.

FORECLOSURE AND REDEMPTION OF MORTGAGES OF PERSONAL
PROPERTY.

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| 1. Effect of a breach of condition ; whether the mortgagor has a right of redemption ; <i>mortgage</i> and <i>pledge</i> compared. 3. General language of the courts upon this subject. 10. Decided cases. | 14. Conditional assignment of a mortgage ; whether redeemable. 18. What will prevent a forfeiture by breach of condition ; payment, waiver, &c. 23. Forfeiture in case of joint mortgagees. |
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1. It has been repeatedly intimated in the foregoing pages, that a mortgagor of personal property forfeits his title by non-payment of the debt at the time appointed. It will be seen hereafter, (*a*) that in some of the States statutes have been enacted, for the purpose of protecting mortgagors from the operation of this rigid principle of forfeiture, by allowing a certain period of redemption after maturity of the debt, or exacting from the mortgagee some formal proceeding of foreclosure. Independently of these statutory provisions, there would seem to be some doubt upon the authorities, whether even a court of equity can afford relief in such case, or whether the mortgagor's title is not absolutely gone. Much ambiguity upon the subject arises from the want of accurate distinction between *a mortgage* and *a pledge* ; (*b*) with regard to the latter of which it is well settled, that the pledgor incurs no forfeiture by failure to pay the debt, but the pledgee has the right to sell the property and pay himself from the proceeds, and is bound to account for the balance.

(*a*) See Appendix No. 2. Also, *Kea v. Council*, 2 Jones, Equ. 345 ; *Robinson v. Lewis*, Ib. 25 ; *Phillips v. Hunter*, 22 Mis. 485 ; *Sullivan v. Hadley*, 16 Ark. 129 ; *Mosely v. Crocket*, 9 Rich. Equ. 339.

(*b*) See Appendix, No. 1, s. 38.

2. In the case of *Kimball v. Marshall*,¹ Richardson, C. J. remarks: — “There is very little in the books on the subject of mortgages of personal property; and what there is, is so intermixed with the law of property pledged, that it is necessary to see in what circumstances mortgages and pledges agree, and in what they differ. When property is pledged, the title of the pledgor does not pass. The pledgee acquires only a special property; a right to the possession until the purpose of the pledge is answered. And possession is essential to the validity of a pledge. The mortgage passes the title unconditionally, and possession is not essential to its validity. If the pledge be for an indefinite period, the pawnee has a right upon request to a prompt fulfilment of the engagement; and if the pawner neglects or refuses to comply, the pawnee may, upon demand and notice, require the pawn to be sold. He may file a bill in equity against the pawner for a foreclosure and sale, or he may proceed to sell, *ex mero motu*, upon giving due notice to the pledgor. And the law is the same, when goods are mortgaged, if no time of redemption is fixed by the agreement of the parties.”

3. The following are some of the *dicta*, which may be considered as expressing the prevalent rule of law upon this subject.² It will be observed that, while all of them recognize the doctrine of an absolute forfeiture *at law*, some of them sustain the right of a redemption *in equity*.

1. “The legal effect and operation of a mortgage of personal property, after the condition is forfeited, is to invest the mortgagee with an absolute interest in the property mortgaged.”³

5. “After the condition forfeited, the mortgagee has an absolute interest in the thing mortgaged.”⁴

6. “A mortgagee of personal property, upon the failure of the mortgagor to perform the condition of the mortgage, ac-

¹ 8 N. H. 292, 293.

² See *Butler v. Miller*, 1 Comst. 496; *Bank, &c., v. Crary*, 1 Barb. 548; *Sumner v. Batchelder*, 30 Maine, 39; *Dane v. Mallory*, 16 Barb. 16; *Nichols v.*

Webster, 1 Chandl. 203; *Talbot v. De Forest*, 3 Iowa, 586.

³ Per Thacher, J., *Thornhill v. Gilmer*, 4 Sm. & M. 163.

⁴ *Brown v. Bement*, 8 John. 98.

quires an absolute title to the chattel. This is well established to be the legal effect and operation of a mortgage of personal property."¹

7. "After the condition forfeited, the mortgagee had an absolute interest in the thing mortgaged. This is the legal effect and operation of a mortgage of personal property."²

8. In *Patchin v. Pierce*,³ the defendant, in an action of trespass for taking personal property, relied upon a mortgage, the condition of which was broken before the taking. The plaintiff relied upon an agreement, made the day before the taking, to extend the time of payment and wait three weeks before taking the property. Nelson, J., says:⁴—"After the default in payment of the money secured by the mortgage, the title to the property became absolute in the mortgagees. Notwithstanding the forfeiture and perfection of the title in the mortgagee in such a case, I have always supposed, and have no doubt, that in *equity*, upon well-settled principles, the mortgagor has the right to redeem. If such remedy did not exist, there might and would frequently be an enormous sacrifice of property. It seems, however, that the right to redeem may be foreclosed, without judicial proceedings, by a sale of the property, as in the case of a pledge, upon reasonable notice to the mortgagor. Tender of the money after forfeiture does not operate to reinvest the title in the mortgagor, so as to enable him to recover at law. If the money be accepted, I think it would have that effect, as the acceptance would be considered a waiver of the forfeiture, the act of the parties being susceptible of no other construction. But the acceptance of a *part* of the money secured by the mortgage would not authorize such an inference, and the establishing of a rule that the payment of a part should be considered a waiver of the forfeiture, would be as inconvenient to one party as to the other, as it would necessarily embarrass all partial payments. It cannot be contended that

¹ Per Sutherland, J., *Langdon v. Buel*, 9 Wend. 83, 84.

² Per Woodworth, J., *Ackley v. Finch*, 7 Cow. 292.

³ 12 Wend. 61.

⁴ *Ib.* 62, 63.

the acceptance of a part of the money would discharge the mortgage; and if it would not, the rule would be of no essential importance to the mortgagor, for a subsequent demand of the balance due and refusal to pay would create a new forfeiture. Besides, in most cases of mortgages of personal property, the mortgagee, by the very terms of the instrument, is entitled to possession at his option, until the money be paid. The promise by the defendant to wait three weeks for payment, or to wait that length of time before he would take the property, was without consideration, and therefore a *nudum pactum*."

9. In a case involving the effect of a mortgage of *growing grass* as personal property, disconnected from the land, Paige, J., remarks: ¹ — "The mortgage, at the time of the levies and sales, had not become absolute, by the failure of the mortgagor to perform the condition. Crary (the mortgagor) was the owner of the fee of the land, and also the legal owner of the growing grass, and had the right of possession of the grass, and an interest therein, until its forfeiture by his non-performance of the condition. The grass was not therefore, by the mortgage, severed in law from the freehold and converted into personalty. After the forfeiture of the condition of the mortgage, as the mortgagee would have acquired an absolute title to the mortgaged property, there would undoubtedly have been a severance, in contemplation of law, of the grass from the land, and it would have then become the personal property of the mortgagee."

10. The following cases may be cited, as illustrating the point now under consideration, although some of them undoubtedly depend upon considerations peculiar to a pledge, and cannot be regarded as applicable to a mortgage, in the strict sense of that term. (c)

¹ Bank, &c. v. Crary, 1 Barb. 545, 546.

(c) Judge Story says, (2 Story's Eq. sect. 1031,) the *mortgagor* may maintain a bill in equity to redeem, within reasonable time. So, in case

11. One possessed of an exchequer annuity, for ninety-nine years, borrowed money upon it, and, for securing this money, there was an absolute transfer of the annuity, but with a defeasance, that if the money were paid at such a day, the assignment should be void. The money was not paid at the day; upon which the lender frequently desired the money, and gave notice that he would sell, and appointing a time for that purpose desired the borrower to be present to see that the annuity was sold at the full value. The borrower, by letter, desired that the lender would stay a week longer before he sold, which was also complied with; and then the lender dying suddenly, the defendant, his administrator, sold the annuity at the exchange, by a sworn broker, for the full value that those annuities then sold for, and which was less than what the money due to the defendant amounted unto. These annuities afterwards rose in value; whereupon the mortgagor brought a bill to redeem, or to compel the defendant to purchase another annuity on the same fund, and of the same yearly value, to be transferred to the mortgagor, on his payment of principal and interest. Lord Chancellor: — “Here is no express power to sell; and annuities for ninety-nine years are like rent-charges

of *pledge*, the debtor may redeem in reasonable time after a breach of condition. If no time of payment were fixed, he may redeem at any time during his life, or his executors after his death, unless payment has been demanded. In general, no bill in equity can be maintained. Otherwise, where an account or discovery is sought, or the pledge has been assigned. (Ib. sect. 1032.) The same author remarks: — “The pledgee might, according to Glanville, at any time bring a suit at the common law to compel the pledgor to redeem by a given day; and, if he did not then redeem, he was forever foreclosed of his right. But the course now adopted is, to bring a bill in equity to foreclose and sell the pledge; in which case, an absolute title passes to the vendee. It has been also said, that the pledgee may, after the time for redemption has passed, upon due notice given to the pledgor, sell the pledge without a judicial decree of sale.” (Ib. sect. 1033.) See, for a learned view of the subject of redemption in case of pledge, *Cortelyou v. Lansing*, 2 Caines, Cas. in Er. 200. See also *De Lisle v. Priestman*, 1 Browne, 183.

out of lands, and not like stocks, which may be thought to be of imaginary value; and there being no decree for foreclosing the mortgagor, nor any agreement in writing that the mortgagee should sell; let the defendant procure an annuity of the like value, and upon the same fund, to be conveyed to the plaintiff upon his payment of the principal and interest to the defendant; and let the Master compute what is due for principal and interest." From which decree an appeal was brought in the House of Peers, where it was insisted, that these exchequer annuities, as well as stocks, were usually sold at the exchange, and that this was as but a pawn; and though there was no express power to sell in the defeasance, yet by the mortgagor's letter, it was plainly submitted to, when the mortgagor desired the sale might be deferred for a week; that the convenience of these securities among merchants, was, that after the day of payment past, they were to be taken to be ready money; and that it would be infinitely troublesome, and dilatory, if there could be no sale of such annuities thus pledged, without a decree of foreclosure; that this would set aside several sales that had been made in the like cases, and occasion multiplicity of suits; that the case here was the stronger, it being that of an administrator, who was obliged to dispose of the assets of the intestate to pay his debts and legacies. Wherefore the decree was reversed by the Lords *nemine contradicente*.¹

11 *a.* Bill, brought in 1729, by the plaintiff, as executor of Sir Thomas Cooke, to redeem the sum of £2500 East India stock, transferred to the defendant April 1, 1708, for securing £2000 and interest; the defendant having obliged himself by a defeasance to re-transfer the stock upon payment of the debt and interest on the 2d of July next. Sir Thomas Cooke died in 1709. Lord Chancellor: — "This is a very plain case for the defendant. In a mortgage of land, a bill of foreclosure ought to be brought, but on a mortgage of

¹ Tucker v. Wilson, 1 P. Wms. 260. (This is said to be a case not of *pledge* but of *mortgage*. Cortelyou v. Lausing, 2 Caines, Cas. in Er. 210. So, also, Kemp v. Westbrook, *infra*, sect. 13, 1b.)

stock it is not necessary, and therefore a strong reason for the mortgagor's departing from the right. 'The admission of a co-defendant to the advantage of the plaintiff, will by no means better the case, unless the plaintiff had entered into proof, by which he would infer some other kind of evidence to account for his coming so late to redeem. It would be of mischievous consequence if I should decree a redemption in this case, for the bill would never have been brought, if the East India stock had not increased in value, which is merely an accident, and could not be foreseen at the time the mortgage was made, and therefore is very far from being an inducement to decree a redemption.'" His lordship dismissed the bill.¹

11 *b*. A bill in equity was brought by an assignee under a commission of bankruptcy against Cordwell, for the redelivery of jewels and plate pledged by him to the defendant, who had also given a promissory note for the delivery over of those goods to the assignee, or the value of them, upon the assignee's paying him all that was due. The Statute of Limitation was relied upon in defence. Lord Chancellor: "There is no color for the statute's being a bar to this demand; no time being given for redemption. Cordwell had time during life to redeem. Then so had the assignee till tender or payment of the money; before which, on the face of the note, *trover* would not lie. It is something like the case of a remainder-man expectant on an estate for life or years, to whom a right to enter or bring an ejectment is given by the forfeiture of the tenant for life or years; yet he is not bound to do so; therefore if he comes within his time after the remainder attached, it will be good; nor can the Statute of Limitations be insisted on against him for not coming within twenty years after his title accrued by forfeiture. I will not say in general, that there is a right to come into equity in every case to redeem pledged goods; yet there are cases where it may be. As the pawnee of stock is not bound to bring a bill of foreclosure of the equity of redemp-

¹ Lockwood v. Ewer, 2 Atk. 303.

tion of the stock, but may sell it, and notwithstanding, the mortgagor may bring a bill here, for an account of what is due, and to have a transfer to him. But there is a strong reason for it in this case; the plaintiff, being an absolute stranger to what is due, has a right to come here to know it, in order to make a tender, which he cannot do without tendering the precise sum; and therefore could never make it, if not allowed to come here first to know that sum.”¹

11 c. The following case bears more particularly upon the right of *tacking*, but also illustrates the general right of redemption. Bill by a widow and executrix to redeem securities pledged by the testator to bankers. It appeared that the testator borrowed £1000, having then £400 in the bankers' hands, and gave his note, with a deposit of bonds and other securities, as a pledge for repayment. These securities were often changed by the testator, and, when one was taken away, another was substituted. The testator owing the £1000 and about £400 on his banking account, the bankers required an assignment of the securities, and the testator prepared a bond and deed-poll for securing £1000, though £400 more was due. The testator overdrew his account after the execution thereof, and at his death owed £541 over the £1000. The bill alleged, that the property of the testator was not more, or little more than sufficient to pay his specialty debts; and that a bill had been filed by creditors against the plaintiff and the heir, in which suit there had been a decree for the creditors to come in. The answer stated, that the practice of the defendants was, never to suffer a customer to overdraw more than £100 without security; that the defendants intended that the assignment should cover the balance due and to become due on the cash account, as well as the £1000 and interest; and that they always considered they had a lien for the whole debt. Lord Chancellor: — “All the cases agree, that if the executor assigned the equity of redemption, it would put an end to the *tacking*; so it would, if the specialty creditor brought the

¹ *Kemp v. Westbrook*, 1 Ves. 278, 279.

bill. I am afraid the rule has been laid down too broad, and that, there being a decree for creditors to come in, they must redeem on payment of the £1000 with interest.”¹

12. In New York, a mortgage being made to secure a surety for rent of a lessee, which the mortgagee was obliged to pay; held, such payment divested the mortgagor of all legal title, and gave a right of action to the mortgagee or his assignee for the property.²

13. In Alabama, on a bill to redeem a slave, conveyed by a bill of sale absolute on its face, on the ground that there was a parol agreement to redeem, or for a repurchase, the subscribing witness was not produced, nor his absence accounted for, and there was no positive testimony rebutting the denial of the parol agreement by the answer. The Court refused to disturb the sale, after a lapse of twenty years, and no excuse shown for the delay.³ And, in another case, the Court in Alabama thus lay down the rules of equity upon this subject:—“We think it may be inferred from the evidence, that the mortgagee was placed in possession of the slave when the mortgage was executed, but we cannot infer what time the precise terms of the contract, in relation to the nature of the services, if any, was made, in point of fact. If there was no stipulation, the law would annex the condition to the mortgage, that the mortgagee should render a due account of all the income, profits, and advantages. If it was stipulated that the services should be set against the interest, it would be a circumstance from which an usurious intent might be inferred, if the then value was greatly more than the accruing interest, and it is very questionable whether equity would not interfere, to relieve against such a contract, (although not usurious in fact,) so as to compel a just account of the profits. By the contract of mortgage, the title was vested in the mortgagee, subject to be divested by the payment of the money, on or before the day stipu-

¹ *Vanderzee v. Willis*, 3 Bro. 20, 21.
See *Marcon v. Bloxam*, 34 Eng. L. & Eq. 475.

² *Swift v. Hart*, 12 Barb. 530.

³ *Hatfield v. Montgomery*, 2 Porter, 58.

lated. On the failure to pay, the title became absolute, and the mortgagor had nothing but an equity of redemption, *the possession having accompanied the mortgage*. At the period fixed for the payment, the value of the services did not amount to the sum due, even if a court of law was competent to ascertain and settle the account between the parties, and no subsequent payment could, in law, have the effect to divest the title of the mortgagee, become absolute by the forfeiture of the condition, or revest it, in the mortgagor."¹(*d*)

13 *a*. A mortgage payable on demand cannot become absolute until a demand.² But a notice of intention to foreclose a mortgage, given to secure a debt payable on demand,

¹ Per Goldthwait, J., *Brown v. Lipscomb*, 9 Porter, 474, 475.

² *Ely v. Carnley*, 19 N. Y. (5 Smith) 496.

(*d*) In South Carolina, by statute, a mortgagor of chattels may redeem them within two years after they have been delivered to the mortgagee. And where on such mortgage was indorsed an agreement of the parties, by which the mortgagee acknowledged the receipt of the property, consisting of slaves, to be held by him, in lieu of interest, until the mortgage debt should be paid; it was held, that no length of possession by the mortgagee under such agreement would bar the mortgagor's right to redeem. *Wurtz v. Heynes*, 2 Hill, Ch. 171.

In North Carolina, where there is a similar statute, on a bill by the administrator of a mortgagor of slaves, to redeem them, redemption was decreed, upon payment of the mortgage debt, and another debt not secured by the mortgage. *Craik v. Clark*, 2 Hay. 22.

In Kentucky, a mortgagor of a slave may redeem after the lapse of five years, provided there has been no adverse holding of five years' duration, at any time within twenty years after the right accrued; and payment of the mortgage may be enforced at any time within the twenty years; but the mortgagee is liable for hire for only the five years next preceding the suit. *Fenwick v. Macey*, 1 Dana, 276.

In Virginia, the purchaser of a slave, from a *bonâ fide* purchaser of the mortgagor, will in equity stand in place of the mortgagor, and be entitled to redeem. *Dust v. Conrod*, 5 Munf. 411.

And, to make an end of the controversy, the Court will give him relief against the mortgagor at the same time. *Ibid*.

So, though he has submitted a suit against him by the mortgagee, for the slave, to arbitrators, in respect to his right to redeem, and such relief. *Ib*.

and containing a covenant for possession by the mortgagor until breach of condition, is equivalent to a demand, and entitles the mortgagee to possession.¹

13 *b.* In Maine, the title of the mortgagee becomes absolute at the expiration of sixty days after condition broken.²

13 *c.* In Illinois, upon forfeiture of the condition, the legal title vests in the mortgagee, and becomes complete in time, if he takes possession.³

14. The question, as to the right of redeeming personal property mortgaged, has in some cases been raised, with reference to the conditional transfer of a mortgage itself. (*e*)

15. In New York, an assignment of a contract, for the purchase of land, conditioned to reassign on payment of a debt, is held a mortgage, and governed by the rules applicable to a mortgage of real estate.⁴ So, where the plaintiff assigned a bond and mortgage to the defendant, absolutely, to secure a debt, taking an agreement in writing to reassign, on payment of the debt, at a day certain; and the plaintiff, after the day of payment, tendered the debt, and demanded a reassignment, which was refused, on the ground that the assignment was an absolute sale: held, the contract was a mortgage, and the plaintiff entitled to redeem; and the defendant, having appropriated the mortgage to his own use, and discharged it, was ordered to pay the balance of the mortgage debt due the plaintiff.⁵

16. In Massachusetts, a mortgagee of real estate transferred the mortgage to a party under whom the defendants claim, on condition to be void, if the assignor should pay the same sum which the mortgage was made to secure to him.

¹ *Goodrich v. Willard*, 2 Gray, 203.

² *Clapp v. Glidden*, 39 Maine, 448.

See Appendix.

³ *Constant v. Matteson*, 22 Ill. 546.

⁴ *Brockway v. Wells*, 1 Paige, 617.

⁵ *Henry v. Clark*, 7 Johns. Ch. 40.

(*e*) In the United States Court, the transfer of a negotiable note and mortgage, for indemnity, the assignee agreeing to retransfer them if indemnified, is a conveyance in trust, not a mortgage. *Warren v. Emerson*, 1 Curtis, 239.

The plaintiff, having acquired the interests of both mortgagor and mortgagee, brings a bill in equity to redeem the original mortgage. Held, he might redeem, on payment of the amount due the defendants from the mortgagee. Metcalf, J., says (in substance): — “The plaintiff has acquired all the right of the original mortgagor to redeem. This being a legal, and not a merely equitable right, the Court has jurisdiction of the cause. The plaintiff has also acquired the title of the original mortgagee. Whether this right of the plaintiff would alone have given the Court jurisdiction, we need not inquire. Having jurisdiction, the Court will examine the whole case, and ascertain what is equitably due to the defendants. They can claim only the debt due (the assignee) with interest. They are not liable to (the mortgagee) for any sum. The plaintiff has acquired all the equitable right that (the mortgagee) had to any surplus which (the assignee) might have received; and therefore if the defendants could claim and receive more than the amount due to (the assignee,) they would be bound in equity to hold the surplus for the plaintiff, and he might recover it back. Circuity of action is to be avoided by a decree that the plaintiff may redeem, on paying to the defendants the amount above stated.”¹

17. It is held in Maine, that, where land is mortgaged to secure a bond, and the mortgagee assigns the bond and mortgage as security for a debt, perhaps the mortgage may be considered as real estate, so as to allow the assignor a right of redemption for three years after condition broken. But even if the assignment is a mortgage of personal property, the mortgagor has still an equity of redemption, by bringing his bill to redeem within reasonable time.² Weston, C. J., says:³ — “Many of the authorities treat a mortgage as a mere incident to the debt it is intended to secure, and as standing in the relation of an accessory to its principal. We are not however prepared to say, that he who

¹ *Farnum v. Metcalf*, 8 Cush. 46-48.

² *Cutts v. York, &c.*, 6 Shepl. 190.

³ *Ibid.* 201.

mortgages an interest in real estate, which he holds himself in mortgage, is not entitled to the statute period of three years, after breach of condition, before his interest can be foreclosed. Stat. 1821, c. 39. The statute is broad enough in its terms to embrace such a case, and an equity of redemption is a favored claim. But from the view we have taken of the case, we do not deem it necessary to decide this point. The doctrine in relation to a mortgage of personal property, is very clearly laid down by Mr. Justice Story in his Commentaries, to which we refer, without adverting to the authorities by which he is sustained. He says, a mortgage of personal property differs from a pledge. The former is a conditional transfer or conveyance of the property itself; and if the condition is not duly performed, the whole title vests absolutely in the mortgagee, exactly as it does in the case of a mortgage of lands. 2 Story on Eq. 296, § 1030. He adds, that in mortgages of personal property, although the prescribed condition has not been fulfilled, there exists, as in mortgages of land, an equity of redemption, which may be asserted by the mortgagor, if he brings his bill to redeem within a reasonable time. Ibid. 297, § 1031."

18. To rebut the statutory presumption, of an abandonment of the right to redeem personal property, on the ground of great mental distress and decay of memory; these facts must be established beyond all doubt, the statute being one of *repose*.¹

19. It has been held, that payment of the debt after breach of condition does not revest the mortgagor's title at law.² But another case decides, that if a mortgagee, after breach of condition, receive the whole debt from the mortgagor, this is a waiver of the forfeiture, and revests the title in him, without any formal delivery; and he may maintain trover against the mortgagee for a subsequent detention of the property.³

20. If, after a mortgage debt is due, the mortgagee takes the property, with the full, mutual understanding, that it is

¹ Ingram v. Smith, 6 Ired. Eq. 97.

² Brown v. Lipscomb, 9 Port. 472.

³ Leighton v. Shapley, 8 N. H. 359; acc. Patchin v. Pierce, 12 Wend. 61.

done in discharge of the note ; the mortgagee becomes absolute owner. The intention of the parties is a question for the Jury.¹ Thus the defendant sold certain steers to the plaintiffs, taking for the purchase-money a note, secured by a mortgage of the steers ; with an agreement that the plaintiffs should have possession till maturity of the note. Some time after the note became due, most of the amount was received by the defendant ; the balance remained unpaid for about two years, when the defendant made a demand, and, on the reply of one of the plaintiffs, that he could not pay it, the defendant demanded the steers, and passed the bill of sale and note, being upon the same paper, to one of the plaintiffs, who examined them, and in presence of the other plaintiff pointed to the steers, saying, " There are your steers ; take them ; " and on inquiry by the defendant told him he turned them out as his, the defendant's, property, and the steers were driven away by the defendant. Within ten days afterwards, the defendant said to a third person, without the knowledge of the plaintiffs or any design that it should be communicated to them, that he did not wish to take any advantage of them, that all he wanted was his right, which was the balance due upon the note. The plaintiffs were informed of this conversation, and, in ten days after the defendant took away the steers, made a tender of that balance and demanded the steers. The defendant refused to deliver them, saying the note was paid by them. The plaintiffs bring replevin for the steers. Held, the demand of the balance of the note, when the steers were taken, was a waiver of the forfeiture.² With regard to the effect of the other proceedings, Tenney, J., says :³ — " It was the right of the defendant, at any time after the note became payable, to take the property into his own possession, he not having relinquished the power to do so, longer than the maturity of the note. It does not appear, that the note and mortgage were given up to the plaintiffs, when the steers were

¹ *Greene v. Dingley*, 11 Shepl. 131.

² *Ibid.*

³ *Ibid.* 137, 138.

taken away by the defendant, though they were passed into the hands of one of the plaintiffs, before they turned out the steers. If there was a full understanding of the parties that the steers were taken in discharge of the note, and that no right of redemption remained in the plaintiffs, the property vested absolutely in the defendant, and his title was no less perfect, than it was before he first parted with it, and nothing short of a repurchase would restore to the plaintiffs, their former rights. But if the property was demanded by the defendant, and delivered by the plaintiffs, that it might be holden only as security and to hasten or enforce the payment, and the note was understood by the parties to be outstanding and unpaid, of which facts the conversation with third persons may be regarded as evidence, a payment or tender, and a demand of the property within a reasonable time by the plaintiffs, would entitle them to a restoration." So in case of a mortgage, under seal, conditioned to be void on payment of one note in sixty days, and another in ninety days; held, upon non-payment of the notes when due, the mortgagee's title became absolute at law; but the time of payment might be enlarged by parol, and the condition saved till the expiration of the extended time; that an agreement "to extend the mortgage fifteen or twenty days," extended the payment of each note for the period of twenty days beyond the time when they were respectively payable, but no further; and, the mortgagee having sold the property after more than twenty days from the time when one note became payable, for a sum exceeding both notes, that he was not liable to an action of money had and received for the balance.¹

21. In case of assignment of a mortgage as security for a debt; the assignee commence and prosecute a suit for the debt, this is evidence of a continuing right to redeem, in the assignor, after breach of condition.² Weston, C. J., says: ³ — "If they had a right to hold, and did hold, the collateral security as absolutely their own, it being of sufficient value,

¹ *Flanders v. Barstow*, 6 Shepl. 357.

² *Cutts v. York, &c.*, 6 Shepl. 191.

³ *Ibid.* 202.

their debt was paid. Their suit for the debt is, by fair implication, an admission that the equity of the demandant was still open, and his right to redeem not foreclosed."

22. The disclosure of trustees showed a mortgage of goods made to the trustees by the defendant in September, 1848. The trustee writ was served on them in November, 1848, more than sixty days after the mortgage was given. On an examination made after November, 1848, there was in the trustees' hands a balance of forty or fifty dollars, the avails of the mortgaged property, over the amount for which the mortgage was collateral. It was contended that the mortgage had been foreclosed before service of the writ; but the disclosure did not show what were the conditions of the mortgage, nor state that a foreclosure had been had, or any measures taken to effect one. Held, the trustees had not discharged themselves.¹

23. Where personal property is mortgaged to several persons, to secure debts owing to them separately, and, by the terms of the mortgage, the whole property is forfeited by a single default; upon such default, it is forfeited to the mortgagees jointly, and they become tenants in common of the whole property, and neither of them, on his debt becoming due, can dispose of the property, and appropriate the proceeds to his own use.²

¹ *Dexter v. Field*, 32 Maine, 174.

² *Tyler v. Taylor*, 8 Barb. 585

CHAPTER LI.

FORECLOSURE AND REDEMPTION. REMEDIES OF MORTGAGEE AND MORTGAGOR IN RELATION TO THE DEBT OR THE SECURITY.

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|---|---|
| 1. General rule as to remedies. | 16. Whether it prevents a personal liability. |
| 2. Foreclosure by sale, &c. | 18. Lapse of time ; effect upon the title. |
| 10. Remedy of the mortgagee at law ; suit for the property ; concurrent remedies. | 19. Parties to a suit in equity. |
| 12. Whether the mortgagor can maintain a suit for the property. | 29. Liability of mortgagee or mortgagor to <i>account</i> . |
| 15. Whether a mortgage creates a personal liability. | 31. Costs. |
| | 36. <i>Receivers</i> . |
| | 40. Foreclosure sale. |

1. THE *remedies* of the respective parties to a mortgage of personal property, as in case of real estate, may consist either of acts *in pais*, without legal process, or of suits in law or equity. (*a*)

2. It is said that after notice the mortgagee may sell the property, whether it be goods, stock, or personal annuities.¹ So, that he may either foreclose or have a decree for sale, though the mortgage include real estate.² The following cases illustrate the general rights and powers of a mortgagee as to foreclosure.

3. In England, in the case of *Slade v. Rigg*,³ a mortgagee of a reversionary interest in stock was held entitled to the common decree for foreclosure in default of payment. In *Wayne v. Hanham*,⁴ the plaintiff, the first mortgagee, with a

¹ 2 Story's Eq. 1031. ² Coote, 285. ³ 3 Hare, 35. ⁴ 4 Eng. Rep. 147.

(*a*) It will be seen by reference to the Appendix, that in some of the States the subject is now regulated by statute. No allusion is made in this chapter to statutory provisions. As to relief in equity, see *Long Dock Co. v. Mallery*, 1 Beas. 94. See also *Hall v. The Sullivan, &c.*, Law Rep., July, 1858, p. 144 ; *Merrill v. Dawson*, 1 Hemp. 563 ; *Daniels v. Henderson*, 5 Flori. 452.

power of sale, claimed a decree of foreclosure, but the defendants, the mortgagor and second mortgagee, insisted upon a decree for sale. Held, the former was the proper form of decree. Sir George Turner, V. C., says:¹—“In such a mortgage, as well as in every other, the mortgagor has a right to redeem. The purpose of a decree of foreclosure is to exclude that right, and unless by the established rule of practice of the Court, the proper mode of excluding that right is by directing a sale, I think it must be excluded, according to the ordinary method of the Court, by foreclosure. The mortgagee may, in such cases, and in some others, be entitled to a sale; but I do not find any rule or practice of the Court which compels him to submit to it. On the contrary, in those cases, in which a decree for sale is made at the instance of the mortgagee, the sale seems to depend more on the will of the mortgagee than on the right of the mortgagor.”

4. In New York, in the case of *Small v. The Herkimer, &c.*,² a distinction was taken between the right of a corporation to forfeit shares, for non-payment of the calls made upon a subscriber, and a pledge or mortgage. Hoyt, J., says:³—“Upon a foreclosure and sale of property mortgaged, if it bring more than the debt the mortgagor is entitled to the surplus. But no provision is made for the company’s refunding the surplus in this case. And if the company after forfeiture should sell the stock for a sum beyond the amount unpaid thereon at the time of forfeiture, the defendant could not recover such surplus. Again, in all cases of a mortgage, the mortgagor has in equity a right of redemption until a strict foreclosure, or a foreclosure and sale. But no such remedy exists for the redemption of stock forfeited under the provisions of a statute like the one in question. It has more of the properties of a conditional sale, when the absolute title does not pass until payment in full.”

5. In Georgia, a process to foreclose may be brought.⁴

¹ 1 Eng. Rep. 118.

² *Ibid.* 549. See *Story’s Eq.* 1325; *Sparks v. Liverpool, &c.* 13 Ves. 428.

³ 2 Comst. 330.

⁴ *Brown v. Greer*, 13 Geo. 285. See *O’Fallon v. Elliott*, 1 Mis. 364.

So, in South Carolina, a bill in equity lies to foreclose a mortgage; and the property may be sold for the purpose of settling the rights of all parties.¹

6. In the same State, a court of equity will make an equitable application of the money arising from a sale of mortgaged property, which is subject to other liens. Thus, several judgments were recovered in South Carolina, and the judgment debtor removed to Alabama, where he mortgaged three slaves. He then returned to South Carolina, and confessed two other judgments, under which the slaves were sold on execution, and the proceeds applied first to the older executions, and the balance to the confessed judgments. Held, the mortgagee was entitled to such balance, and the creditors who received it were ordered, on a bill in equity, to account to him therefor.² (b)

7. In Mississippi, A. obtained a decree against B. for the foreclosure of a mortgage upon slaves, and assigned it to C. and others, who agreed with D. to purchase certain of the slaves at the commissioner's sale for \$3000, whether the slaves should cost more or less at the sale, and pay for them in three equal annual instalments. D. purchased the slaves, and gave bond for the price. The bond having been forfeited, an execution issued thereon, and D. enjoined it. Held, that the injunction could not be retained.³

7 a. In Kentucky, the mortgagee of a slave in possession received the hire for more than a year after the balance due him had been ascertained and reported to the Court. Held,

¹ Bryan v. Robert, 1 Strobb. Eq. 334.

² McKeithen v. Butler, 2 Rich. Eq.

³ Shotwell v. Webb, 23 Miss. 375. 37.

(b) In Louisiana, a *sequestration* of mortgaged personal property is allowed. In order to obtain such sequestration, upon the ground that it is about to be removed from the State, the plaintiff must make oath not merely to his apprehension of such removal, but the facts upon which it rests. McFarlane v. Richardson, 1 La. Ann. 12; Bres v. Booth, ib. 307.

In Massachusetts, a mortgagee cannot give notice and foreclose, after the property has been attached, and he has been summoned as trustee. Hobart v. Jouvett, Mass. S. J. C., Oct. 1850. Law Rep. July, 1852, p. 169.

a decree for a sale to pay such balance, not ascertaining and deducting such hire, was erroneous.¹ So, on a bill to foreclose a mortgage of a slave, a peremptory decree for payment of the sum supposed to be due, and that execution issue therefor, was held erroneous.²

8. In the following case, a mortgagee was held entitled to relief in a court of equity, on account of liabilities incurred by him by reason of the mortgage.

9. In July, 1841, the plaintiff lent to the defendant £880, taking his note, and a mortgage of 100 shares in a banking company. In March, 1842, the defendant transferred the shares to the plaintiff in the form required by the company regulations, and the transfer was duly recorded. July 15, 1842, the loan was increased to £1000, and the transaction confirmed and brought down to that date, the charge being increased to £1000. August 4, 1843, the defendant paid the debt. August 25, the plaintiff applied to the directors (who, under the deed of settlement of the bank, had power under certain terms to refuse a transfer) to transfer the shares to the defendant. The defendant concurred in the application, and signed and sent to the office a requisition to transfer. September, 1843, pending the question of transfer, an alleged creditor of the company recovered judgments against the public officer of the company, and soon afterwards, the bank being insolvent, proceeded to enforce the judgment against the plaintiff. The plaintiff files a bill against the defendant for indemnity. Held, he was entitled to such indemnity against all liabilities properly incurred by him as holder of the shares, from the time of transfer to him.³

10. A mortgagee acquiring the title to the mortgaged property by his mortgage, (c) the whole interest of the mort-

¹ *Clark v. Robbin*, 6 Dana, 349; ² *Madison v. Grant*, 6 J. J. Marsh. acc. *Pennington v. Pyle*, 3 Dana, 529; 641.
Woodard v. Fitzpatrick, 2 B. Mon. 61. ³ *Phene v. Gillon*, 9 Jur. 1086.

(c) It has been held, that, if a mortgagor in possession of the property puts it on board a belligerent ship and it is captured, the mortgagee has no remedy to reclaim it. *Bolechos v. Three Negro, &c.*, Bee, 74.

gagor, except his equity of redemption,¹ may enforce the right of possession as well in law as in equity. Thus he may maintain an action of detinue.² So, where the debt is payable on demand, the mortgagee may sue for a taking of the property, though there has been no demand.³ And where the property has been wrongfully converted, an action to recover its value may be maintained by the mortgagee prior to the time the mortgage becomes due, if there is a clause which authorizes him to take possession and sell it, to satisfy the debt, at any time he shall deem himself insecure.⁴ So in case of a mortgage in the usual form; but further providing, that, upon default, or if the mortgagee shall at any time deem himself in danger of losing his debt by delaying the collection thereof until it becomes payable, he may take possession at any time before or after the time limited for such payment, and sell the property, &c.: held, the mortgagee might foreclose before default; and that an assignee of the mortgagee had a right to take possession, and retain it, as against the mortgagor, and all persons claiming under him, before the debt became payable.⁵ So, although a mortgagor, left in possession of the property, may undoubtedly transfer it to a third person, subject to the lien of the mortgagee; yet where the sale is such, as to indicate that this lien is not recognized by the parties, the mortgagee may maintain trover for a conversion. Thus, in trover for a horse, the plaintiff claimed under a mortgage duly recorded. It appeared that the mortgagor, being left in possession, sold the horse, which subsequently passed into the hands of the defendant, but on what terms did not distinctly appear. The defendant held and used the horse as owner, and then sold him and parted with the possession, being informed of the

¹ 29 Barb. 518.

⁴ Chadwick v. Lamb, 29 Barb. 518.

² Hopkins v. Thompson, 2 Port. 435.

⁵ Rich v. Milk, 20 Barb. 616.

³ Brown v. Cook, 3 E. D. Smith, 123.

In South Carolina, a mortgagee of slaves has in equity no legal title, but holds them merely as collateral security. *Bryan v. Robert*, 1 Strobb. Eq. 334.

mortgage. The plaintiff demanded the horse from the defendant, after he had parted with him. Held, the action should be maintained.¹ Parker, C. J., says :² — “ The defendant might purchase the horse, subject to the mortgage ; and there seems to be no objection, in such case, to a delivery of the animal to the vendee, if the rights of the mortgagee are not thereby prejudiced. A removal of the horse, under such a sale and delivery, to a distance, so that the mortgagee could not gain possession of him without great inconvenience, might be evidence of a conversion. There seems to be no reason to doubt that a purchaser of the property, subject to the mortgage, who had lawfully taken the possession, might hold that possession until a demand was made ; and if before a demand the horse had died, or if, for any other sufficient reason, he could not comply with the demand, his refusal would not constitute a conversion. But in this case, the purchase of the entire property, and an assertion of a right to a sole ownership under it, might be held to be a conversion, being inconsistent with the rights of the mortgagee. And it seems clear that the subsequent sale was of itself a conversion. The general principle is, that assuming to one's self the property and right of disposing of another man's goods, is a conversion. It is so in the case of a sale of the entire property by a tenant in common. And the principle seems to be equally applicable in the case of a sale by a mortgagor, or any one claiming under him, in exclusion of the rights of the mortgagee.” So a mortgagee, having the immediate right of possession, unless there is an express stipulation to the contrary, may maintain an action of trespass against one who wrongfully takes the goods away, although he has not given notice to the mortgagor or person in possession, pursuant to (Mass.) Stat. 1843, chap. 72, sect. 1, of his intention to foreclose.³

11. It has been held, upon the general principle of *concurrent remedies*, heretofore explained, (chap. 29,) that the mort-

¹ *White v. Phelps*, 12 N. H. 382.

² *Ibid.* 385, 386.

³ *Brackett v. Bullard*, 12 Met. 308.

gagagee may proceed at the same time to enforce his rights in a court of law and a court of equity. Thus, in an action of detinue for slaves, the defendant relied upon the record of a chancery suit, brought for the purpose of foreclosing the mortgage upon which the plaintiff rested his title. From the transcript it appeared, that the Court pronounced an interlocutory decree of foreclosure, and ordered a sale of the property by commissioners, who were to make a report as the foundation of a final decree. They reported a sale of the land included in the mortgage, but not of the slaves, as to which nothing further had been done. The Court say:¹—“The right transferred to the plaintiffs by the mortgage was, no doubt, a legal one, and might unquestionably be asserted by them in a court of law. It was competent, no doubt, for the plaintiffs to apply to a court of equity, for the purpose of foreclosing the equity of redemption; but their having done so does not, *per se*, form a bar to their legal right in an action at law. Where a mortgagee proceeds both at law and in equity, for the purpose of obtaining satisfaction for his demand, the court of equity has not unusually put the plaintiff to his election, either to proceed with the action at law or the suit in equity; but it does so, not because the pendency of the one suit is in itself a bar to the other, but, in the exercise of its discretionary power over its suitors, to prevent multiplicity of suits, and to save expense to the litigants.” So, where the grantor in a deed of trust, conveying personal property as security, sells to different persons, the creditor secured may maintain a bill for foreclosure, and for recovery of the slaves sold from the purchasers, although actions at law might have been brought, in the name of the trustee, against the several purchasers, to recover the property.² And, on the other hand, a mortgagor of slaves may maintain a bill to redeem, for an account of hire, &c., notwithstanding he might have maintained an action at law, after tender of the debt.³

¹ Jones v. Henry, 3 Litt. 51.

² Ambler v. Warwick, 1 Leigh, 195.

³ Wilkins v. Sears, 4 Monr. 343.

12. In an action against the mortgagor, or one claiming under him, for the property, it is held that the defendant may set up his right of redemption, if not foreclosed, as a defence, and reduce the damage to the amount due on the mortgage.¹ But, upon the ground that the mortgagee is the legal owner, and the mortgagor retains a mere right of redemption, the latter cannot maintain *trover* for the property against the former, even where there has been no breach of condition. Thus property mortgaged to secure a note, payable in six months, was immediately delivered to the mortgagee, and by him sold for cash, at the end of sixty days after the note became due. In an action of *trover*, brought by the mortgagor against the mortgagee for the property, it was proved, that the note was made to indemnify the latter against a liability for the former, that such liability had ceased without any loss or damage to the mortgagee, and that the property had been demanded before suit. Held, the action could not be maintained. Wilde, J., says:—"To maintain *trover*, the plaintiff must have a legal title to the property. It is not sufficient to show an equitable title, or that the defendant had converted the property which he was bound to convey to the plaintiff. In the present case, the carriages and harnesses sued for were the property of the defendants, having been conveyed to them by the plaintiff, to secure the payment of a note of hand from him to them. Now admitting that the defendants have never been damnified, and that the mortgage has never been foreclosed, as alleged by the defendants, still they had the legal title to the property. If those carriages and harnesses had been pledged, the action might have been maintained, if the defendants had never been damnified; for in that case they would have no right to sell the property, and such sale would have been wrongful, and would have been a conversion, for which *trover* would lie, the pledgee's special property having been terminated by their wrongful act, and the general property always having remained in the plaintiff. But the law is

¹ *Hirman v. Judson*, 13 Barb. 629.

otherwise in the case of a mortgage. The whole legal title passes to the mortgagee conditionally; and in the present case the condition had not been performed at the time of the sale; and at that time the legal title to the property was in the defendants, and the plaintiff had no right to the possession. By the sale, the legal title was vested in the purchaser, and the subsequent demand on the defendants is of no avail."¹

13. On the other hand, as, until breach of condition, the mortgagee has a mere lien; he is liable to an action for damages if he sell the property or convert it to his own use.² So, where the mortgagee claims to be absolute owner, the mortgagor need not tender the debt before bringing a suit.³ And to a suit for foreclosure, a plea, that the plaintiff has appropriated the property to his own use, will entitle the defendant to a judgment for whatever is due him.⁴ But if a mortgagee takes possession of the property and sells it, the mortgagor cannot maintain trespass as for a trespass *ab initio*. His remedy for the sale is an action on the case.⁵

14. If a portion of the property has been sold with the mortgagor's consent, and the proceeds applied towards the debt, he may file a bill to redeem the residue.⁶

15. The question has arisen, in regard to a mortgage of chattels, as of lands, how far the mortgage itself creates a personal liability upon which a suit can be maintained. (See chap. 6.) Thus, in New York, there was an assignment of a lease, "upon this condition, if I shall pay to the said, &c. by the 1st, &c., the aforesaid sum, &c., then this assignment to be void; otherwise he may sell it, and from the money retain the £12, &c.; paying the remainder to me or my heirs." Held, an action of covenant did not lie upon this instrument.⁷ The Court say:⁸ — "The assignment contains no covenant for the payment of money. The as-

¹ Holmes v. Bell, 3 Cush. 322, 323.

² Rhines v. Phelps, 3 Gilm. 455;

Spaulding v. Barnes, 4 Gray, 330.

³ Watts v. Johnson, 4 Tex. 311.

⁴ Ashworth v. Dark, 20 Tex. 825.

⁵ Leach v. Kimball, 34 N. H. 568.

⁶ Locke v. Palmer, 26 Ala. 312.

⁷ Salisbury v. Philips, 10 Johns. 57.

⁸ Ib. 58.

assignment only contains a condition for the benefit of the assignor, that he might redeem the lease by such a day, on payment of the money, and if he elected not to do this, the assignee was to sell the lease and pay himself. This was the only remedy prescribed for the assignee." So it is held in New York, that an action of debt will not lie upon a chattel mortgage to recover the sum thereby secured, unless the mortgage contains an express agreement to pay it, or a distinct acknowledgment of an existing debt. To sustain such action, it is not sufficient that the instrument transfers the property "for the purpose of securing the payment of the sum of," &c., with a proviso to cease and be void on payment by a certain day; and in case of default authorizes a sale, and an application of the proceeds in payment, rendering the overplus to the mortgagor.¹ But in the same State it is said:² — "Where one person acknowledges, by deed or otherwise, a certain sum to be due to another, an action of debt or assumpsit, as the case may be, will lie to recover it. The language is equivalent to a formal covenant or promise, and the appropriate action would lie without the allegation of either; they being implied. The acknowledgment of the indebtedness itself creates a legal liability sufficient to sustain the action, and the admission in this case is as broad as that contained in a single bond." And, in Kentucky, a writing in the following terms: "Borrowed from, &c., \$275, for which I have placed in his hands as security, a negro girl; should I not pay said sum of money (by a certain day) the said girl is to be the absolute property of, &c., and I bind myself to give a bill of sale when demanded;" was held sufficient to sustain an action of covenant for the debt.³ Robertson, C. J., says:⁴ — "As the contract was not, according to its legal operation, a sale, a contract to refund the money must be presumed; and such a contract is expressed by the writing itself, when properly construed. 'Borrowed' imports necessarily an obligation to return the thing

¹ *Culver v. Sisson*, 3 Comst. 264.

³ *Hart v. Burton*, 7 J. J. Marsh. 322.

² *Per Nelson, J., Elder v. Rouse*, 15 Wend. 220, 221.

⁴ *Ibid.* 324.

borrowed, if it be loaned for use, or to return its kind and value if it be loaned for consumption."

16. In reference to the opposite question, how far the taking of a mortgage interferes with a personal right of action to recover the mortgage debt; it is held that a vendor of personal property may maintain an action for the price, though at the time of sale he received a mortgage back as security, containing a power of sale on default of payment.¹ Nelson, J., says :² — " The purchase-money of the boat constituted a debt for the recovery of which the vendor had his remedy by action, when it fell due. It was not necessary that a note or bond should have been given to preserve the debt; it existed and continued in full force, without such personal security. The mortgage was given as *collateral security*, and did not merge the demand. The one is the *principal*, the other the *incident*, and the latter can never merge the former." And, more especially, where A. obtained a judgment on a note against B., who brought his bill for relief, alleging that he had mortgaged a slave to A., as security; and the evidence, that the note was given for the sum advanced by A. when he received the slave, proved insufficient; the bill was dismissed.³

17. The question also arises, whether the mortgagee's accountability for the property, in case of loss or depreciation, can be relied on as a defence to a suit upon the debt.

17 *a*. The mortgagee of a slave, which dies without his fault, may maintain an action for the mortgage debt.⁴ So, to secure the debt of the defendant, the owner of a store, standing upon land of another, mortgaged it to the creditors, the plaintiffs. The debt was payable on demand, and in the mortgage no time limited for payment. The present action, being assumpsit for the debt, was commenced December 5th, and the plaintiffs took possession, under the mortgage, December 19th. On the 21st, the store was burned without fault of the plaintiffs or defendant. The defendant claims

¹ Sterling v. Rogers, 25 Wend. 658.

² Ibid. 659.

³ Hall v. Forqueran, 2 Litt. 329.

⁴ Hart v. Burton, 7 J. J. Marsh. 324.

to have the value of the store deducted from the debt. Held, the claim could not be allowed, either as a payment or in set-off.¹ Howard, J., says:² — “By the Revised Statutes, c. 125, § 30, the mortgagor of personal property has sixty days in which he can redeem the property, after condition broken. By the mortgage the plaintiffs acquired a conditional title only to the property; and by taking possession, for condition broken, their title was not perfected; for the debt remained due, and the mortgagor could redeem within the time prescribed by the statute. So long as the right of redemption existed, the title to the property could not become absolute in the plaintiffs, nor could they appropriate it in payment of their debt; and, until their title was perfected, the law would not thus appropriate the property. The mortgagee of personal property, in possession after condition broken, and while the right of redemption exists, is responsible for ordinary diligence in the management and preservation of the property, and is liable for ordinary neglect. In this respect his duties and responsibilities are similar to those of a pawnee. If the property be destroyed without fault on his part, he cannot, while thus holding it as security for his debt, be held to account for it. But for the net proceeds of the income or profits, accruing to him before the destruction, he would be accountable.”

18. The question, whether a mortgagee's title is barred by lapse of time, (see ch. 25,) has been raised in regard to mortgages of personal property. (*d*) In an action of detinue by the mortgagee of slaves against the mortgagor, it was contended that twenty years' possession by the defendants was *prima facie* evidence of payment; but the defence was not sustained.³ The Court say:⁴ — “After the lapse of twenty

¹ Covell v. Dolloff, 31 Maine, 104.

² Ibid. 106.

³ Jones v. Henry, 3 Litt. 51. See Waterman v. Brown, 31 Penn. 61.

⁴ Ibid.

(*d*) A statute, providing that a suit might be maintained on the note as long as it would lie upon the mortgage, was held to apply to personal property. Demeritt v. Batchelder, 8 Fost. 533.

years from the time money secured by mortgage should have been paid, we admit in general, payment will be presumed; but the presumption is a presumption of fact, and may be repelled by extraneous evidence; and in this case, the circumstance of a suit in chancery having been brought before the lapse of twenty years, for the purpose of foreclosing the defendant's equity of redemption, together with the proceedings and pendency of that suit, are abundantly sufficient to do away the presumption which might otherwise have attached against the plaintiff's demand. But continued possession of slaves for six years after the law day by the mortgagee, after forfeiture, without recognition in any way of the mortgagor's rights, justifies an application of the analogy of the statute of limitations, and bars the mortgagor's right to redeem, notwithstanding there may be a provision in the mortgage entitling the mortgagee to possession until the debt was paid.¹ (e)

19. With regard to the proper *parties* to a suit for foreclosure of a mortgage of personal property; the question arose in Alabama, whether a third person, in possession, and claiming a title to the property, must necessarily be joined in the bill. In reference to this point, and to the established rule of equity as to mortgages of real estate, (see ch. 31,) Collier, C. J., says: ² — "Where land is conveyed by way of mortgage, it has been supposed that it was allowable for the mortgagee to proceed against the mortgagor, so as to make his security available, without making either a prior or subsequent incumbrancer a party; that the rights of the former are paramount, and those of the latter will not be concluded, unless he is brought before the Court. And this although a sale may

¹ Byrd v. McDaniel, 33 Ala. 18.

71. See Singleton v. Gayle, 8 Port.

² Branch, &c. v. Taylor, 10 Alab. 70, 270.

(e) In Arkansas, where a mortgagor of slaves remain in possession after default of payment, the mortgagee has the same time to bring a bill to foreclose and sell, that is allowed him, under like circumstances, to commence an action at law for the possession of the slaves; and the limitation to such action is three years. Ewell v. Tidwell, 20 Ark. 136.

follow a decree of foreclosure. But in the case of personal estate, in order to consummate a sale, the possession would necessarily be changed, and this makes it necessary, where a third person is in possession, under a claim of right, that his title should be passed upon before the sale takes place. Where, however, the decree operates on land, upon the report of the sale having been made, the Court may make such order in respect to the possession as is proper, or may leave the purchaser to his action at law. The complainant's debt was admitted. Here, then, was a just ground of complaint as to Taylor, the mortgagor, and the question is, whether the legal title which McRae set up was subversive of the entire suit. The analogies furnished by the law, where real estate is the subject of litigation, would seem rather to indicate that an issue should be directed to try the validity of the independent title, or it may be that proceedings should be stayed until the complainant had shown its insufficiency to defeat the mortgage in an action brought to recover the possession of the slaves; or, perhaps, a decree of foreclosure might be rendered, and its execution by sale postponed, until the complainant recovered the possession of McRae. Whether the title asserted by McRae should be met and adjudicated in the one form or the other, we are satisfied that the bill should not have been dismissed *in toto*. The mortgage would have estopped Taylor, had he attempted it, from asserting the invalidity of his title to the slaves. The answer of McRae, whatever be its effect in his favor, cannot prejudice the complainant's right to a decree against the mortgagor."

20. Where, on a bill to foreclose, a decree for sale has been entered, a person in possession, not made party, may be ruled into court, and, unless he shows a paramount title, will be ordered to deliver the property to the commissioner, for sale; and such order may, if necessary, be enforced by attachment.¹

21. The executors, and not the heirs, of a mortgagee of

¹ Commonwealth v. Ragsdale, 2 Hen. & M. 8.

slaves, should file a bill to foreclose the mortgage;¹ and if there be no executor or administrator, the fact should be suggested, and the children of the mortgagee made parties.² So, where A. gave B. a mortgage, to indemnify him as his surety on a debt to C.; on a bill *quia timet* by B. against A.'s representatives, for a decree that they pay the debt and indemnify B; held, the bill would lie, but C.'s representatives must be made parties.³

22. Where a mortgagee has lost his lien, under the statute of Alabama, of 1823, as to creditors of the mortgagor, this is no defence to a bill to foreclose the mortgage. Where a creditor wishes to avoid such mortgage, and has not obtained a specific lien by judgment, he should file his bill, making the personal representatives of the mortgagor and the mortgagee parties, and asserting his right to satisfaction out of the property.⁴

23. Bill to redeem slaves, which had been in B.'s possession some years, under a written transfer from A., which A. claimed to have been a mortgage. B. having, previously to the filing of this bill, mortgaged the slaves to the Bank of Kentucky, the bank, during the pendency of A.'s bill, filed their bill for foreclosure, and obtained a decree, A's bill having been dismissed. The slaves were sold under the decree, and purchased by C., a son of B., who had died. The decree dismissing the bill of A. was afterwards reversed, and the executors of B. were decreed to restore the slaves. The executors, failing to comply, set forth the above facts, and C., in answer to a rule upon him, denied that the decree, as to the bank or himself, was conclusive, they not having been parties to the bill of A. Held, that C. had a right to litigate these facts before he should be required to surrender the slaves.⁵

24. A mortgage to a surety for indemnity will enure to the benefit of the creditor, who can maintain a bill for foreclosure.⁶

¹ *Harrison v. Harrison*, 1 Call, 419.

² *Ibid.*

³ *Call v. Scott*, 4 Call, 402.

⁴ *Stewart v. Fry*, 3 Ala. 573.

⁵ *Macey v. Fenwick*, 9 Dana, 198.

⁶ *Troy v. Smith*, 33 Ala. 469.

25. Where a suit is brought against husband and wife, there may be a foreclosure against both, but not a joint judgment on the note.¹

26. The assignee of a mortgage is the proper person, and has full right, to institute a suit for foreclosure. It is not a good defence to such suit that the assignor was insolvent. Nor that the mortgagor had sold part of the property with consent of the mortgagee or his assignee; without an allegation that the proceeds had been applied to the mortgage debt.²

27. By an assignment of the owner of mortgaged property, it was agreed that the assignee should sell it, and, after paying the incumbrances and his own charges and advances, pay one half the surplus and one half the intermediate profits to the assignor; and afterwards they further agreed upon a fixed sum to be paid the assignor in full for all his interest. The assignee then sold, subject to this agreement, and the buyer assumed the payment of the sum fixed. The buyer then sold to one who did not agree to pay the sum fixed, but took subject to the claim, and he sold to one with notice of the claim, and who agreed to pay said sum. Held, that the first assignor may join all the assignees in a bill to compel a sale and a payment of the fixed sum from the proceeds, and should the property prove deficient, to recover from the first and second assignees personally, in their order, the deficiency. But he cannot have such judgment against the third purchaser who did not promise to pay, nor against the fourth, whose assignor was under no personal liability.³

28. A complaint, claiming upon such a state of facts to have said fixed sum declared a lien upon the property, is a single cause of action; the several liabilities of the other purchasers are collateral matters, and may be enforced to make good any deficiency.⁴

29. Cases have often occurred, in reference to the liability of a mortgagee or mortgagor, to *account* for the value of the property, in case of redemption.

¹ Daniels v. Henderson, 5 Flori. 452.

² Wynn v. Ely, 8 Flori. 232.

³ Ford v. David, 1 Bosw. 569.

⁴ Ibid.

30. Where it is stated in a bill for redemption of slaves, that they were "pledged or mortgaged;" on a decree for redemption, the holder must account for their hire, the words "pledged" and "mortgaged" being considered equivalent.¹

31. Where the mortgagee of a slave refuses to deliver him, upon tender of the debt, and the slave afterwards dies, the mortgagee must bear the loss.² But a mortgagee is not liable for the value of a slave, who died after tender and refusal of the consideration, if the slave was laboring under the disease of which he died at the time of delivery to the mortgagee and the tender.³

32. A mortgagee in possession will be allowed, in account, for all necessary repairs, management, and improvements.⁴

33. Where a mortgagee of a slave appeared to have acted in good faith in hiring out the slave, and to have rendered a true account of the hire; held, though the slave might have been more advantageously hired out, the mortgagee should be charged only with the amount of hire, to be applied first to the interest, then the principal, at the several periods when the hire was payable, and this notwithstanding the insolvency of the parties hiring; and that he could not charge for his trouble in managing the property.⁵

34. With regard to the liability of a *mortgagor* to account; a mortgagee of slaves is not entitled to have them delivered to him specifically, nor to have an account for their hire.⁶ So, where the mortgagee of a chattel permits the mortgagor, who is the debtor, to receive the profits of the chattel, he cannot have an account against the personal representatives of the mortgagor, for moneys received by him in his lifetime from such profits.⁷ Even though there was a special agreement to apply the profits to the debt.⁸ But such contract is binding on the personal representative; and profits realized by him, and accruing after the death of the

¹ Wilkins v. Sears, 4 Mon. 343. See Overton v. Bigelow, 10 Yerg. 48.

² Goodman v. Pledger, 14 Ala. 114.

³ Shannon v. Speers, 2 A. K. Marsh. 311.

⁴ Lowndes v. Chisholm, 2 McC. Ch. 455.

⁵ Clark v. Robbins, 6 Dana, 349.

⁶ Whitmore v. Parks, 3 Humph. 95.

⁷ Stewart v. Fry, 3 Ala. 573.

⁸ Ibid.

mortgagor, are to be accounted for to the mortgagee, and are not assets.¹

35. Where the mortgagor, in a suit for a mortgaged slave against the mortgagee, claims damages for detention, and is permitted, without objection, to prove the value of the use or hire; the jury may apply it to the extinguishment of the debt.²

36. A *receiver* may be appointed, in case of danger to the property.³ But a receiver will not be appointed over a mortgagee in possession, nor an injunction issue against selling, where the mortgagor admits there is a balance still due, and that the pledge is not an inadequate security; unless there is an allegation of danger to the property, or irresponsibility on the part of the mortgagee.⁴

37. A receiver, who, without the consent of the mortgagor, and notwithstanding an injunction obtained by the mortgagee, whose mortgage was duly recorded, sold the goods at auction, in parcels, to different people, and without any notice given or recognition of the rights of the mortgagee, in consequence of which the security was lost; is liable to the mortgagee for the full face of the mortgage with interest, and interest on the aggregate amount from the time it became due. If justified in taking them at all, he was bound to keep them till the mortgage fell due; or, if he sold them, to sell only the mortgagee's right of temporary possession with the equity of redemption.⁵

38. But a purchaser without notice, at such sale, is not liable in damages to the mortgagee, if the latter fails to refile a copy, &c., as prescribed by statute.⁶

39. A person made party defendant to a bill to redeem a mortgage in trust, as having a claim for services included in it, which, by the terms of his contract, was to be paid to his son for the benefit of his wife, appeared and answered, and

¹ *Stewart v. Fry*, 3 Ala. 573. See *North v. Drayton*, 1 Harp. Ch. 34; *Chambers v. Mauldin*, 4 Ala. 477.

² *Watts v. Johnson*, 4 Tex. 311.

³ *Rose v. Bevan*, 10 Md. 466.

⁴ *Bayaud v. Fellows*, 28 Barb. 451.

⁵ *Manning v. Monaghan*, 1 Bosw. 459.

⁶ *Ibid.*

represented the claim before the master. The master reported the amount of the claim, and that it should be paid to the son, for the mother. Held, the court would not overrule the allowance, or delay the cause, at the instance of the plaintiffs, who claimed as creditors of the mortgagor under a general assignment executed by him subsequently to the mortgage, because the son and wife were not parties to the bill.¹

40. A collusive purchase at the foreclosure sale, for the benefit of the mortgagee, is void.²

41. If a sale is made without a compliance with statutory requirements, objection should be taken when the sale is reported.³

42. In case of two mortgages made for indemnity on account of indorsements, a bill in equity being brought for instructions to an assignee of the property, by whom it was sold for the benefit of all concerned; a distribution of the proceeds was ordered to be made directly to the holders of the indorsed notes, and not to the mortgagees.⁴

43. The following case, already cited in another connection, may here be referred to upon the question of *costs*.

44. The owner of $\frac{8}{64}$ of a ship transferred them by a bill of sale, on which was indorsed, that if the vendor should pay the vendee £100 and interest, the bill of sale should be void. Interest was subsequently paid. The bill of sale was registered, but the registry did not notice the indorsement. The vendee having sold the property, the vendor brings a bill to redeem; and a decree was rendered in his favor, with costs, so far as they arose from a denial or dispute of his right to redeem.⁵ (f)

¹ Spencer v. Pierce, 5 R. I. 63.

² Pettibone v. Perkins, 6 Wis. 616.

³ Gayle v. Fattle, 14 Md. 69.

⁴ Aldrich v. Martin, 4 R. I. 520.

⁵ Whitfield v. Parfitt, 6 Eng. R. 48.

(f) In reference to the form of decree, &c.; the mortgage, decree of foreclosure, and report of the commissioner appointed to sell under the decree, are to be taken together; and if the property is described in the mortgage, and the decree follows the mortgage, and the report certifies to the sale of

the property described in the decree, the report sufficiently identifies the property. *Conger v. Robinson*, 4 S. & M. 210.

An omission, in such report, to state the name of the purchaser and the amount of the sales, renders it defective ; but does not justify a suspension of an execution of the sale-bond. *Ibid.*

Where a bill alleges, that the mortgagor of a slave is about to remove him, the Chancellor will anticipate the day of payment, so far as to secure the property ; but, in decreeing a sale, the surplus should be decreed to be paid to the mortgagor ; the Chancellor should decide on the sum due, give a day for payment, and decree a foreclosure and sale *nisi*, and afterwards decide whether the decree has been performed or not, and if not, make the decree absolute. It is erroneous to leave it to a commissioner to decide, whether the tender was or was not a good one, and whether payment was or was not made. *Downing v. Palmateer*, 1 Mon. 64.

CHAPTER LII.

CONDITIONAL SALE OF PERSONAL PROPERTY.

1. THE distinction has been pointed out at length (ch. 5) between a *mortgage* and a *conditional sale* of real estate. The same distinction has been applied in the case of personal property. It is said,¹ "there is no difference in point of law, between a sale for a price paid, or to be paid, which is to become absolute on a particular event, and a purchase accompanied by an agreement to resell upon certain agreed terms. In both cases, the sale is to be regarded as conditional, and if the condition which is to defeat it is promptly performed, in the one case the title will not vest in the vendee, and in the other it will be divested."

2. It is held that conditional sales are not to be favored; but, in all cases of doubt, the court inclines in favor of mortgages. That the general tests, in doubtful cases, are the adequacy of the consideration, and the continuance or extinguishment of the debt.² So, upon the question, whether a conveyance of slaves was intended as a security or a conditional sale, the facts, that the grantor was illiterate, needy, and in the power of the grantee; that the price was grossly inadequate, and was not paid, but only promised; and that the instrument included a much larger interest than the grantor had, — are very decisive evidences that a security was intended.³

3. In *Eiland v. Radford*,⁴ the intestate of the plaintiff made an absolute bill of sale of a slave to the defendant.

¹ Per Collier, C. J., *Sewall v. Henry*, 9 Ala. 34. See *Marshall v. Lewis*, 4 Litt. 140; *Edrington v. Harper*, 3 J. J. Mar. 353; *Bishop v. Rutledge*, 7, 217; *Perkins v. Drye*, 3 Dana, 170.

² *Parish v. Gates*, 29 Ala. 254.

³ *Wilson v. Weston*, 4 Jones, Eq.

349.

⁴ 7 Ala. 724.

Afterwards the latter executed a defeasance, by which he stipulated to deliver the slave to the vendor, provided he repaid him, on a certain day, a sum equal to that expressed in the bill of sale. Held, a conditional sale. The Court applied to the case the following tests of distinction between mortgages and conditional sales. Did the relation of debtor and creditor subsist before the alleged sale? Did the transaction commence by a proposition to lend or borrow money? Was there a great disparity between the value of the property and the price? Did the vendor continue bound for the debt? And the absence of any personal obligation is held a strong circumstance to prove a bill of sale, absolute on its face, to be a conditional sale, and not a mortgage.¹ (a)

¹ *Scott v. Britton*, 2 Yerg. 215; *Locke v. Palmer*, 26 Ala. 312.

(a) So, in the absence of any promise to pay, a subsequent agreement by A. to convey to B. property of B. which A. bought when about to be sold, is not a mortgage. *Magee v. Catching*, 33 Miss. 672.

On a bill filed to have a deed absolute on its face declared a mortgage, a writing, executed by the grantee several months after the original deed, reciting that it was agreed between him and the grantor, at the time the deed was executed, that, if the latter repaid to him by a specified day the amount of the consideration-money expressed in the deed, then he would reconvey to him, and binding himself to reconvey accordingly, is evidence of the highest character against the grantee; and, although it may not be sufficient of itself to show that the parties intended a mortgage, yet if the other evidence in the case, taken in connection with it, establishes that to have been the purpose of the parties, or even renders it doubtful whether a mortgage or a conditional sale was intended, it is enough to induce a court of equity to declare it a mortgage. *Locke v. Palmer*, 26 Ala. 312.

A deed absolute on its face was declared a mortgage, on proof of these facts: That the transaction originated in a loan of money, and the relation of debtor and creditor existed between the parties; that some of the articles were not enumerated in the deed; that the creditor gave up the debtor's notes, and retained no evidence of the debt; that the creditor, about two months afterwards, acknowledged in writing that, at the time the deed was executed, it was agreed between them that, if the debtor repaid to him by a specified day the amount expressed as the consideration in the deed, then he would reconvey to him, and bound himself to reconvey; and that all the

4. Conveyance of a slave, to secure a certain sum. The grantor afterwards agreed with a third person, that the latter should pay the debt, take the slave, and hold him for a certain time, at the expiration of which he should receive the sum advanced, or pay the grantor the balance of the value of the slave. Held, this agreement was a conditional sale, not a mortgage.¹ Allen, J., says:² — “The Court is of opinion, that the contract, as understood by both parties, and as appears from a true construction of the agreement between them, was a conditional sale of the slave, at a price to be fixed by a fair valuation at a future day; that the mode of ascertaining the price was for the benefit of the seller; and in this aspect the case is free from the objection sometimes preferred, that such contracts are a device resorted to for the purpose of obtaining property from a needy debtor at less than its fair value. In this case possession of the property was delivered to the purchaser, who was entitled to retain such possession until the time fixed for the payment of the money, without accounting for hires. That the seller reserved the right to abrogate the contract of sale, by returning the money advanced, without interest; and if not so abrogated, the contract of sale became executed, and Strider became liable for the balance of the price of the boy.”

5. To an absolute bill of sale, signed by the vendor, was attached a condition, signed by the vendee, as follows: “The condition of the above obligation is such, that if, &c. pays, &c. the above sum, &c. by January 1, 1827,” &c. Held, this was not a mortgage, but a sale with liberty to repurchase, and that the word *pay* in the condition did not con-

¹ Strider v. Reid, 2 Gratt. 38.

² 2 Gratt. 42, 43.

property, both real and personal, remained in the debtor's possession, without any agreement for rent or hire so far as the evidence disclosed. Ibid.

No action to recover a debt will lie on a mortgage which contains no agreement to pay, nor an admission that anything is due. Weed v. Covill, 14 Barb. 242.

stitute a covenant by the vendee to pay. It was said, that, to constitute a deed a mortgage upon its face, it must show the consideration to be either a debt due, or money lent at the time, or else must contain a covenant to pay; that the intention of the parties at the time changes the deed into a mortgage; and this may be shown by parol evidence.¹ So an absolute bill of sale of slaves, with a bond back, conditioned that the vendee would cancel it upon the vendor's giving him satisfactory evidence of the payment of a debt for which the vendee was surety; was held not a mortgage.² So A., being in want of money, delivered to B. a female slave, and received of B. £70, the full value of the slave, the use of which B. was to have for the interest of the money; and, in case of her death within a certain time, the loss was to be borne by A.; if afterwards, by B. On a bill to redeem, twelve years afterwards, held, a conditional sale, and not a mortgage.³ So a writing was given as follows: "This is to certify, that if A., or his heirs, shall pay me the sum of \$400 within twelve months from date, then I oblige myself, my heirs, &c., to deliver to said B., his heirs, &c., a negro bought of him for \$400, if said slave should be alive." Held, a bill of sale, with the privilege of repurchasing for a limited period, and not a mortgage, as the consideration was adequate; and that the general indisposition of A. to part with his slaves, or the fact that the purchaser was accustomed to take mortgages of slaves, would not warrant the Court in construing it as a mortgage.⁴ So A. applied to B. for a loan of money, which B. refused, but offered to advance the money if A. would sell him a certain slave at a fair price, which offer was acceded to, and \$600 was agreed upon as a fair price; and B. agreed to reconvey the slave on repayment of the sum advanced, and interest, at a certain time. Thereupon A. executed a bill of sale of the slave, which recited the consideration of \$394 as paid by B. therefor, with the conditions in the bill, that, if A. should pay to B. the

¹ *Hickman v. Cantrell*, 9 Yerg. 172.

² *Forkner v. Stuart*, 6 Gratt. 197.

³ *Critcher v. Walker*, 1 Mur. 488.

⁴ *Harrison v. Lee*, 1 Litt. 191.

sum of \$394 on or before the 25th day of the following December, with lawful interest, then the conveyance should be void ; but if A. should fail to pay such sum and interest at that time, that he should deliver the slave to B. and make him a complete title, on his paying to A. \$206. Held, that the transaction was not a mortgage, but a conditional sale, which B. could make absolute by the payment of \$206, on A.'s failure to perform the condition imposed on him by the contract.¹ So trover was brought, under the following facts and agreement : " Boston, March 15, 1850. Albert Benson, of Plymouth, bought of J. B. Whittier four carriages, as follows : one carryall, \$225, &c., and said Benson is not to hold the above carriages until he has paid for the same. Terms of payment as follows : \$200 cash down, &c. ; each and all of them with interest ; which payments are to be indorsed on this instrument as they are made to said Whittier. And provided said Benson does not meet the said payments as they become due, then the said Whittier can take the said carriages for such payments, each or any of them, and said Benson forfeits what he has previously paid, as witness my hand and date above mentioned. Albert Benson." Among several indorsements upon the instrument, the first was as follows : " Rec'd of the within agreement, \$200. Plymouth, March 15, 1850." Held, this was not a mortgage, but a conditional sale, and that Whittier might maintain trover against a mortgagee of Benson.² So A., by articles of agreement, " gives, grants, bargains, and sells" to B. certain slaves, for a stated consideration for each, it being understood that A. may redeem any and all of them within twelve months, at the valuation affixed. Held, a conditional sale. The agreement being transferred to C., and D. claiming to have an interest in the slaves, it was agreed between C. and D. that one of the slaves should remain in the possession of C., and another of D., until the agreed value of each was paid to C., and that then perfect titles

¹ Moss v. Green, 10 Leigh, 251. Nov. 1852, Law Rep., Jan. 1853, p.

² Whittier v. Barnes, Mass. S. J. C., 520.

should be made by C. to D. Held, this agreement was not a mortgage.¹ So S., the owner of certain machines, agreed with A. and B. as follows: "A. and B. agree to pay S. for the above machines and belting, time, services, and expenses, the sum of \$810.75, within five months, and S. agrees to take the above amount as above stated, but lends to said A. and B. the property above stated; and if they fail to pay, he is at liberty to take the property away, to enable him to realize the amount and interest." Held, a conditional sale, and not a mortgage, and that the property could not be taken on an execution against A. and B., though the agreement had not been filed, as a mortgage.² So a mortgagee applied to a third party for a loan on the security of the mortgage, which was refused, but an offer made to purchase the mortgage outright, for a sum less than the face of it. An agreement of sale was thereupon executed by the mortgagee, who received from the purchaser a covenant of the same date, that he would sell it back within a period named but not afterwards, for the price paid, with interest. Held, in the absence of evidence that the consideration paid was inadequate, and of any personal liability on the part of the vendor, a conditional sale and not a mortgage.³

6. In case of sale with liberty to repurchase, the condition must be strictly performed; if not, equity will not relieve. Otherwise, where there is the least fraud or oppression.⁴ And the tender must be made with all legal formalities.⁵ Thus, in case of a conveyance by absolute deed, with liberty by a condition under seal to repurchase the property, the seller applied to a third person to take an assignment of the condition, pay the money, and take a conveyance of the property as security; which the party agreed to do. On the day appointed they went to the vendee, and the third person tendered the money and requested a conveyance to himself. The vendee refused to convey to him, but offered to receive the money and convey to the vendor, which the third person

¹ *Murphy v. Barefield*, 27 Ala. 634.

² *Grant v. Skinner*, 21 Barb. 581.

³ *Quirk v. Rodman*, 5 Duer, 285.

⁴ *Hickman v. Cantrell*, 9 Yerg. 172.

⁵ *Ibid.*

refused. Held, not to be a performance of the condition by the vendor, and that the vendee was bound to convey only to him.¹ (b)

¹ *Hickman v. Cantrell*, 9 Yerg. 172.

(b) The subject of *equitable mortgages* has been considered at length in former chapters, (22, 23.) The following case, involving several miscellaneous points, turns in part upon the distinction between legal and equitable mortgages of personal property.

Where B. promises A. to buy machinery of C. and let A. have it to use, at an agreed price per yard for cloth made by it at A.'s factory, B. to furnish the raw cotton, and credit A., towards payment for the machinery, with what the cloth sells for beyond that price and expenses; this is not at law a mortgage of the machinery by A. to B., because the title did not come from B. to A., and their agreement was not made at the time when B. got his title. But, if an absolute debt from A. to B. existed, to be secured by a mortgage, and a memorandum at the bottom of the contract called the machinery collateral security for the money paid for it by B., and in the contract it was said to be security for the advance made, it may be deemed in equity a debt, though A. was said to be "at liberty" to pay the money advanced. *Almy v. Wilbur*, 2 W. & M. 371.

This contract may be considered a mortgage in equity, and A. could not afterwards legally sell the machinery to D., till he had fully paid the debt to B.; and D., having notice of the facts, or notice enough to put him on inquiry, could not hold the machinery without paying the balance due. *Ib.*

Such a contract, though a mortgage, need not be recorded, to make it valid between the parties or those having notice of it. Possession of such property by A., who did not own it before the mortgage, is not within the policy of the law as evidence of fraud, whether it is a mortgage or not. Nor is the machinery so in the control and disposition of A., as to make it liable for his debts, like property of third persons in the power and disposal of bankrupts under the provisions of bankrupt laws. *Ib.*

A bill in equity does not lie, merely to procure from D. an account of the machinery and its rents and profits; but may be maintained for the discovery of material facts, and to require D. to redeem the property mortgaged, or restore it and its rent. *Ib.*

Held, the Statute of Limitations did not run, till the demand of B. upon D., and a refusal to return the machinery. *Ib.*

A. or D. has a remedy against B. to perform his contract, on tendering the balance due, and B. may have relief in chancery from his contract to convey, unless A. or D. will, within reasonable time, pay the balance due him. *Ib.*

A. purchased a slave, the property of B., at an execution sale, but allowed B. to retain possession, under a parol agreement, that, whenever B. should refund the purchase-money, either to A., or to the party who advanced it to A., on his note, the title should be reconveyed to B. B. died without making such payment, and subsequently A. died, having devised the slave to B.'s children. The lender then recovered the amount of the note against A.'s estate. Held, that A.'s representatives had no claim against those of B. for the sum recovered, since, regarding the transaction as an equitable mortgage, the devise by A. was a conversion. *Upchurch v. Darnall*, 3 Sneed, 443.

APPENDIX.

No. I.

PAWN OR PLEDGE. HYPOTHECATION.

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| <p>1. Mortgage and pledge compared and distinguished. Definitions of a pledge <i>per se</i>, and as contrasted with a mortgage. The two forms of security considered in connection.</p> <p>21. Terms of a pledge ; power of sale.</p> <p>22. Property pledged.</p> | <p>30. Parties ; assignment, &c.</p> <p>34. Delivery.</p> <p>35. Liability secured ; future debts, interest, &c.</p> <p>38. Remedies, foreclosure, sale, and redemption.</p> <p>55. <i>Hypothecation</i>.</p> |
|--|---|

1. As a natural and useful sequel to the foregoing view of mortgages of personal property, it seems proper to present a brief abstract of the law pertaining to *pawns* or *pledges*. These two forms of assignment resemble each other, in being alike conditional transfers for the purpose of security, and in many of the rights and duties which respectively grow out of them ; and therefore a treatise relating to the one would be *practically* imperfect, without some reference to the other. While, on the other hand, as will be seen, in a *scientific* and *technical* arrangement and division of subjects, the mortgage and the pledge cannot be treated in connection, because they constitute, in the eye of the law, totally distinct transactions. The following definitions and explanatory remarks of Judges and elementary writers will show at once the analogies and the distinctions between a mortgage and a pledge of personal property ; as connected with the requisite formalities of the two modes of transfer, the immediate title of the respective parties, and the right on the one hand of regaining the property by satisfaction of the debt secured, or, on the other, of appropriating it in payment of that debt.

2. A pledge is a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged.¹ Or, a delivery of goods or chat-

¹ Jones on Bailm. 117 ; 1 Dane, ch. 17, art. 4 ; 2 Kent, 577.

tels, to be security for money borrowed.¹ Or, a bailment of personal property, as a security for some debt or engagement.²

3. "A pledge is a deposit of goods to be redeemed on certain terms. Delivery always accompanies a pledge, and a mortgage of goods is often valid without delivery."³

4. A pledge is a mere bailment; but, in case of a mortgage, a breach of condition vests an absolute title in the mortgagee.⁴

5. "A mortgage is a pledge and more; for it is an absolute pledge to become an absolute interest, if not redeemed at a certain time: a pledge is a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation or the course of trade to be a lien upon them."⁵

6. "A mortgage of personal property differs from a pledge. The former is a conditional transfer or conveyance of the property itself; and, if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in the case of a mortgage of lands. The latter only passes the possession, or, at most, a special property only to the pledgee, with a right of retainer until the debt is paid, or the other engagement is fulfilled."⁶

7. "In a mortgage of a personal chattel, the general property passes to the mortgagee, subject to be redeemed, according to the terms of the contract; and if not redeemed within the time limited, the property becomes absolute in the mortgagee. The consequence is, that the mortgagee may sell or otherwise dispose of the chattel immediately. But in case of a pledge, the general property does not pass, but remains in the pawnor, the pawnee having only a special property or lien; and in this case, although the pledge may not be redeemed by the time limited, yet, it retains the character of a pledge still."⁷

8. "It has been argued for the defendant, that as the possession did not continue in the mortgagees, the transfer is void as against the other creditors; and this argument must prevail, if it be true, as the defendant contends, that there is no distinction in law between a pledge and a mortgage of goods. A pawnee has only a lien on goods deposited as a pledge, which cannot be maintained but upon the basis

¹ *Coggs v. Bernard*, 2 *Ld. Raym.* 909.

² *Story*, 291.

³ *Barrow v. Paxton*, 5 *Johns.* 261.

⁴ *White v. Cole*, 24 *Wend.* 117.

⁵ *Jones v. Smith*, 2 *Ves. Jr.*, 378; *Doak v. Bank, &c.*, 6 *Ired.* 309.

⁶ 2 *Story's Eq.* § 1030; *Brown v. Bement*, 8 *Johns.* 98.

⁷ *Per Phelps, J.*, *Wood v. Dudley*, 8 *Verm.* 435.

of possession. If therefore he relinquishes the possession, although the debt remains unpaid, the lien is *ipso facto* extinguished. But there is an obvious and material distinction, in this respect, between a pledge and a mortgage. By the latter the right of property passes to the mortgagee, and he may dispose of it as he sees fit, subject only to the condition or right of redemption. Possession is not essential to his title. This distinction seems to have been disregarded or even overlooked in some cases; it is nevertheless perfectly well established.”¹

9. It will be seen, however, that the question, whether a particular transaction is a pledge or a mortgage, is often a very nice one. *The intention of the parties* has been said to determine it.² So the distinction appears to be often forgotten or rejected, where circumstances do not call for its immediate application. Thus, in an early case in Massachusetts,³ Parsons, C. J., remarked:—“The conveyance by Weeks & Son to the plaintiffs being a *mortgage*, it is a *pledge* of a personal chattel.” So Judge Story says:—“In the Roman law, a pawn (*pignus*) was distinguished from an hypothecation (*hypotheca*) by the circumstance, that in the former case possession was delivered to the creditor; but in the latter retained by the debtor. The words, however, seem often to have been confounded”⁴ So the *Civil Code* of Louisiana describes a mortgage as a species of, and bearing a resemblance to, a pledge. 1. It is given to a creditor as security for his debt. 2. Both bind the thing subjected, and it cannot be subjected to a second creditor to the prejudice of the first. The points of difference are, 1. A mortgage is only on immovables and slaves, or rights to be hereafter specified, but a pledge may be of movables corporeal or incorporeal. 2. A pledge requires delivery to the pledgee or a third person; which is not necessary in a mortgage.⁵

10. So in a case where the question arose, whether a sale should be considered as absolute or conditional, the Court say:—“The parties, and especially the plaintiff, may have intended that the contract should become a sale on the non-payment of the \$275 within the eleven days allowed for the reimbursement of the loan. But as the writing states the consideration to be a loan of money, and shows expressly that the slave was delivered to the lender as a collateral security, the contract, according to legal intendment, is a *pawn* or

¹ Per Wilde, J., *Holmes v. Crane*, 2 Pick. 610.

² *Wood v. Dudley*, 8 Verm. 435.

³ *Portland, &c. v. Stubbs*, 6 Mass. 425.

⁴ Story, *Bailm.* 290, § 286.

⁵ *Louis. Civ. Code*, 1024.

mortgage. It is not material *whether this be a mortgage or a pawn.* The right of redemption attaches equally to both, and it is as difficult to transmute the one as the other into a sale, by the operation of the original contract. Every agreement for preventing redemption of pawns is proscribed by the common law as emphatically as are similar agreements in mortgages of real estate. Whatever may have been the actual intentions of the parties, the deduction of law from the fact of loan and of security is, that the contract was not a sale, but a pledge or mortgage only.”¹

11. One leading characteristic of a mortgage consists in its being a *written* transfer, while a pledge derives its efficacy chiefly from delivery to, and possession by, the pledgee. It has been remarked, however, by the Court in New York: — “I am not aware that it is necessary to the validity of a mortgage of goods and chattels that it should be in writing, except so far as the act of 1833 in relation to the filing of mortgages of goods and chattels requires them to be in writing. That act declares that a mortgage not filed shall be void as against the creditors of the mortgagor and subsequent purchasers and mortgagees in good faith. The controversy here is not between a mortgagee whose mortgage is not filed, and a creditor of the mortgagor or a subsequent purchaser or mortgagee. The defendant appears here as a wrongdoer.”²

12. On the other hand, a pledge may be created by a written transfer, where the property is not susceptible of manual delivery and possession, as in the case of stock in a corporation; and the transaction may be a pledge, and not a mortgage, though the legal title passes to the creditor.³

13. A transfer, in terms absolute, was made upon the books of a corporation, of shares in the company; but accompanied by a promissory note for a certain sum, in which it was stated that the stock was deposited as collateral security. Held, a pledge, and not a mortgage.⁴

14. Where property is delivered as security for a debt, with an agreement in writing, that, if the debtor does not return by a certain time to pay the debt, the creditor may dispose of the property and pay it; this is a pledge, and not a mortgage.⁵

15. If, *bonâ fide*, and without fraudulent intent, a mortgagor of

¹ Per Robertson, C. J., *Hart v. Burton*, 7 J. J. Marsh. 322, 323.

² Per Paige, J., *Bank, &c. v. Jones*, 4 Comst. 506, 507.

³ *Wilson v. Little*, 2 Comst. 443.

⁴ *Ibid.*

⁵ *Brownell v. Hawkins*, 4 Barb. 491.

chattels makes a new and distinct contract to deliver them to the mortgagee, with others, as security for the mortgage debt, and accordingly delivers them, and the mortgagee takes and holds them under the new contract; he becomes pawnee of the whole; even though the parties designed merely to perfect a supposed valid title under the mortgage.¹

16. An instrument, giving security upon a chattel, for the payment of a debt on a future day, providing for the debtor's continued possession, till that day, and, on non-payment, authorizing the creditor to take possession, though using the words, "I hereby *pledge* and give a lien on," &c., is not a pledge, but a mortgage.² (a) Sutherland, J., says: ³ — "It has all the essential attributes of a mortgage; it recites the original purchase, the payment of part of the consideration-money, the giving of two notes for the balance, and then states, that, for securing the payment of said notes, the said, &c., hereby pledges and gives a lien on said engine to said, &c., the said, &c., however, to retain the possession until the notes shall become due, and if they are not paid, then the said, &c., to take possession."

17. Contract: "sold and delivered to, &c., as his own property. The condition of this bill of sale is such, that if I redeem said property within, &c., and pay the intervening expense, then this bill of sale to be void, otherwise of full force to convey said property to," &c. Held, a mortgage, not a pledge. Phelps, J., says: — "It is evident that a mortgage was contemplated. The general property is passed, subject to a redemption. It is a sale with condition. Had the parties intended to make it a mortgage, as distinguished from a pledge, they could not use stronger or more explicit language. Indeed, they could not add to it, unless they had used the negative language, that it was not to be considered a pledge."⁴

18. Bill of sale, by a tenant to his landlord, of his furniture, goods, &c., in the house, upon condition to be void on payment of rent, and not to impair the right of distraining. Held, a mortgage, not a pledge.⁵

¹ Rowley v. Rice, 10 Met. 7; 11 Met. 333.

² Langdon v. Buel, 9 Wend. 80.

³ Ibid. 83.

⁴ Wood v. Dudley, 8 Verm. 455.

⁵ Barrow v. Paxton, 5 Johns. 258.

(a) So where the condition is contained in a separate defeasance. Williams v. Roser, 7 Mis. 556.

19. Bill of sale, under seal, of horses, for the consideration of two hundred and ten dollars; the vendee at the same time giving back an agreement, that, on payment of this sum to him in fourteen days, he would deliver the horses. The money was not paid or tendered within the time, but was tendered about six months after the date of the bill of sale. It appeared that the mortgagee had sold one of the horses, but not when it was done. Held, the transaction constituted a mortgage, not a pledge; that by breach of condition the mortgagee acquired an absolute title; and that the mortgagor could not maintain *trover* against him.¹

20. A deed of furniture was made to the plaintiff, conditioned to be void, if the maker should indemnify the plaintiff from his liability upon certain notes indorsed by him, but not yet due. The deed and furniture were formally delivered in presence of a witness, who alone was informed of the transaction, but the debtor remained in possession and use of the property as before. Held, the conveyance might constitute a mortgage or pledge, according to the intent of the parties; and, as the debtor remained in possession, it could not be a pledge, and was therefore a mortgage, and, no actual fraud being shown, was valid against creditors of the mortgagor.²

20 *a*. No lien or right of property in the thing pledged passes to an assignee of the debt, unless the assignment of the debt, intended to be secured by the pledge, be accompanied with a delivery of such pledge to the assignee.³

21. With regard to the terms of a pledge, it is held, that goods may be pledged to a creditor, to be redeemed on payment of the debt, with the right, on the part of the creditor, to sell the pledge, pay the debt, and account for the surplus to the debtor, who may at all times waive his right to redeem, if he is to have such surplus; and when the creditor sells the property, he becomes a trustee of the debtor for the surplus.⁴ And the same principle applies, where the debtor pledges the property jointly to several creditors; or, by way of indemnity against their liability, to parties who become sureties on his account.⁵

22. In regard to the property upon which a pledge creates a lien, it is said that by a pledge, not only the thing itself passes, but also,

¹ *Brown v. Bement* 8 Johns. 96.

² *Ward v. Sumner*, 5 Pick. 59. See *Homer v. Savings, &c.*, 7 Conn. 478; *New London, &c. v. Lee*, 11, 112.

³ *Johnson v. Smith*, 11 Humph. 396.

⁴ *Stevens v. Bell*, 6 Mass. 339.

⁵ *Ibid.*

as accessory, its natural increase; as, for instance, the young of a flock of sheep.¹

23. It has been said, "it may well be doubted, whether the owner of a chattel can pledge an undivided part of it, without delivering the whole to the pawnee."²

24. The following decisions relate particularly to paper securities, or evidences of title, commonly termed "*choses in action*;" which may be, as well as other personal property, the subject of pledge, vesting a special property in the pledgee, while the general title remains in the pledgor.³ (*b*)

25. It is held that a *chose*, which is transferred as collateral security, is put under the dominion of the creditor to make his claim out of it, and is not in the nature or subject to the incidents of a pledge.⁴

26. But the holder of a negotiable note, as collateral security for the debt of the payee, is a holder for value, and may recover thereon against the maker, although he has paid the note to the payee without notice of the indorsement; but he can recover only the amount for which the note is held as security.⁵

27. If a negotiable note indorsed in blank be delivered to an officer by the holder, as a pledge for securing the amount of an execution in his hands for collection; the officer may maintain an action on the note in his own name as indorsee, notwithstanding a subsequent wrongful sale of the note to himself at auction. Thus the plaintiff, a sheriff, having an execution against a debtor, received from him as a pledge or collateral security for the execution a note signed by the defendant, and indorsed in blank by the execution debtor. The plaintiff kept the note two months, and then advertised it as the property of the indorser, and sold it at auction to himself as the highest bidder, of which he made return on the execution. Held, the plain-

¹ Story, Bailm. 297, § 292.

⁴ Chambersburg, &c. v. Smith, 11

² Per Parsons, C. J., Portland, &c. v. Stubbs, 6 Mass. 425.

Penn. 120.

⁵ Valette v. Mason, 1 Smith, 89.

³ Garlick v. James, 12 Johns. 146.

(*b*) Having only a special property, the pledgee of a promissory note has authority merely to receive the amount of it from the maker; not to compromise with him for a less sum, or to dispose of it in any other manner till after the pawnor's default in redeeming. Garlick v. James, 12 Johns. 146.

tiff might recover the note from the defendant.¹ The Court say :²—
 “ It is not pretended by the counsel for the plaintiff, that he acquired a title to this note, by virtue of the sale on the execution. But the note was put into his hands as a pledge, with the name of the promisee indorsed upon it, and it was a negotiable note in its form. This was a transfer, sufficient to enable the plaintiff to maintain the action ; for the indorsement comprehended an authority to bring a suit, and to receive the money of the promisor. Otherwise, upon non-payment of the debt by the indorser, the plaintiff had no security.”

28. A factor cannot pledge a bill of lading.³

29. The pledgee of stock in a private corporation is not entitled to notice of the meetings, as *owner*.⁴

30. With regard to the parties to a pledge, it is held that one with a limited title may pledge *pro tanto* ; thus a tenant for life, for years, &c. So, a pledgee may pledge his interest ;⁵ or assign the pledge to the extent of his legal interest therein.⁶

31. If any security, which is transferable by indorsement, whether legally assignable or not, be indorsed by the original holder, and pledged as collateral security for a debt ; the pledgee, or any other person having lawful possession of it, may also transfer or pledge it to another, who may hold it against the original owner.⁷

32. The following case relates to an assignment of the debt secured, without the property, resulting, in connection with other acts, in a loss of the security.

33. After notice to a pledgee of an assignment of the property by the pledgor, the former transferred the note, without the property, to one not notified of the pledge, and at the same time promised to show him how he might secure it by attachment, and showed the property to an officer, in order that it might be attached by the indorsee and other creditors of the pledgor. The officer thereupon took possession of the property, not being notified of the lien, nor agreeing to hold for the pledgee. The assignee brings trover against the officer, for refusing to give up the property. Held, the defendant was not an agent of the pledgee, authorized to keep possession for him ; that as the pledgee had disabled himself and the indorsee to return the prop-

¹ Bowman v. Wood, 15 Mass. 534.

² Ibid. 534, 535.

³ Story, 209, § 296.

⁴ McDaniels v. Flower Brook, &c., 22 Verm. 274.

⁵ Hoare v. Parker, 2 T. R. 376 ;

McCombie v. Davies, 7 E. 5 ; Story, 209, § 295.

⁶ Jarvis v. Rogers, 15 Mass. 389.

⁷ Jarvis v. Rogers, 13 Mass. 105 ; 15, 389.

erty on payment of the note, and perhaps even by transferring the note alone, he had waived his lien; and that the action was maintainable.¹

34. Although delivery is in general essential to the validity of a pledge, it may in some cases be symbolical, and not actual; as, in case of goods at sea, delivery of the muniments of title; or the key of a warehouse. So, if the pledgee is already in possession, the contract itself will be sufficient. So, if the pledgee delivers back the property to the pledgor, as a special bailee or agent; it is held that the pledge still remains valid. Otherwise, where he agrees it may be attached.² So, if the actual delivery or personal possession of the pledge be impracticable or inconvenient, a special property may vest in the pledgee without delivery or possession.³ Thus the mere showing of logs in a boom to the pawnee was held sufficient to transfer the title.⁴

35. With regard to the liability secured by a pledge, it is held that a pawn may be security for other engagements than a debt.⁵

36. Upon the question, already considered at some length in connection with mortgages of real and personal estate, (chaps. 12 and 39,) how far *future debts* may be thus secured, it is held, with more special reference to a pledge, that if there are any subsequent engagements, intended by the parties either tacitly or expressly to be attached to the pledge, the pledgee has a title and right of possession, co-extensive therewith.⁶ But he cannot detain the thing for a former debt, unless there is some just presumption that such was the intention of the parties.⁷ So, the pledge cannot be retained for a

¹ Whitaker v. Sumner, 20 Pick. 399.

⁴ Ibid.

² Story's Bailm. 300, § 297 (c); Macomber v. Parker, 14 Pick. 497, 505, 509; Whitaker v. Sumner, 20 Pick. 399; Johnson v. Smith, 11 Humph. 396.

⁵ Isaack v. Clark, 2 Bulstr. 306.

⁶ Demandray v. Metcalf, Prec. Ch. 419.

⁷ Jarvis v. Rogers, 15 Mass. 389.

³ Jewett v. Warren, 12 Mass. 300.

(c) Judge Story says (Story, Bailm. 292, § 288):—“There are cases where mortgages of chattels are held valid, without any actual possession by the mortgagee; but they stand upon very peculiar grounds, and may be deemed exceptions to the general rule. They either stand upon the positive provisions of some statute, or they are the result of some contract, stipulating for the possession of the mortgagor, under circumstances in which such possession is deemed compatible with good faith, and does not hold out false colors to creditors or purchasers.”

subsequent debt, unless there is just ground of presumption that it was incurred upon the credit of the pledge.¹

37. The pledge applies not only to the debt or other engagement, but also to the interest, and all the incidental charges and expenses due thereon. If interest is expressly agreed for, the pledge will cover interest, such being the presumed intention. So where interest is not expressly provided for, but becomes due on account of delay in payment of the debt. So the pledge covers expenses incurred in relation to it, if necessary and proper for its protection and preservation; otherwise if merely useful, unless incurred by the express or implied authority of the pledgor.²

38. With regard to the *remedies* of the pledgor and pledgee, respectively, it is held, that the pledgee may sell the property upon default of payment at the time: or, if no time of payment is fixed, after demand and notice. If the pledgor is absent or cannot be found, judicial proceedings should be had, to bar his right of redemption.³ Upon this subject Judge Story says:⁴ — “The common law of England, existing in the time of Glanville, seems to have required a judicial process to justify the sale, or at least to destroy the right of redemption. But the law, as at present established, leaves an election to the pawnee. He may file a bill in equity against the pawner for a foreclosure and sale; or he may proceed to sell *ex mero motu*, upon giving due notice of his intention to the pledgor. In the latter case, if the sale is *bonâ fide* and reasonably made, it will be equally as obligatory as in the first case. But a judicial sale is most advisable in cases of pledges of large value; as the Courts watch any other sale with uncommon jealousy and vigilance; and any irregularity may bring its validity into question. With the exception of Louisiana, where the Civil Law prevails, the English rule seems generally adopted in America.”⁵

39. The pawnee may proceed personally for the debt, without selling the pledge.⁶ (d) And if, in consequence of any default or

¹ 2 Kent, 584.

² Story, Bailm. 306-308. See *Wheeler v. Newbould*, 16 N. Y. 392.

³ *Garlick v. James*, 12 Johns. 146.

⁴ Story, Bailm. 310, § 308.

⁵ *Ibid.* 311, 312, § 310.

⁶ *South, &c. v. Duncomb*, 2 Str. 919.

(d) The rule may be considered well settled, as stated in the text. The following English case fully sustains it, and does not appear to have been overruled. Upon a trial at bar in an action for money lent, it appeared that £8,000 was advanced to the defendant by the plaintiffs in the year 1720,

conversion of the pawnee, the pawner has by action recovered the value of the pawn, not deducting the debt ; the debt is still recover-

upon a pawn of £2,000 stock. And the defendant not repaying it, the question to be tried was, whether the plaintiffs could proceed against the person of the defendant, or must stand to the remedy against the stock. And after proof of many particulars, to induce a belief that in these loans no regard was had to the personal security ; the Court left it to the Jury upon this point, that where money is generally lent upon a pledge, it will not deprive the lender of his remedy against the person ; and that to discharge the person of the borrower, there must be a special agreement to stand to the pledge only. And the Jury found for the defendant. *The South Sea, &c. v. Duncomb*, 2 Stra. 919.

An early case in Massachusetts (*Cleverly v. Brackett*, 8 Mass. 159) is sometimes cited in support of the contrary doctrine, that the pledgee cannot proceed to recover the debt by an attachment without first restoring the pawn. It may be doubted, however, whether this case fully sustains such a general rule, even if it were not repugnant to other decisions. The case was as follows. It was an action of trespass for taking a gelding and two heifers. The defendants justified the taking by virtue of a writ of attachment in favor of one of them against the plaintiff, the other being an officer ; upon which the plaintiff delivered, and the creditor accepted, the gelding as a security in part ; and afterwards, by virtue of the same writ, the gelding being insufficient, the heifers were attached. The presiding Judge at the trial expressed the opinion, that in attaching personal property to secure a debt, the creditor and officer, if sufficient had not been taken before delivery of the summons, were justifiable in making a further attachment ; but if sufficient had been previously taken, then a further attachment, after delivery of the summons, or any proceeding oppressive in fact to the supposed debtor, was not to be justified. No attachment of the gelding being returned, and the delivery and acceptance of the gelding as a security upon the agreement of the parties being vacated by the determination to attach, the Judge directed a verdict for the plaintiff. In setting aside the verdict, the Court remark (*Ib.* 151) : — “ After he (the creditor) had received the gelding as a pledge for his demand against the plaintiff, he could not lawfully attach other property for the security, without first returning the pledge ; for he could not know how far the pledge was competent to his full security. By thus unlawfully attaching the heifers, therefore, he committed a trespass. And if the constable knew of the gelding's having been pledged as it was, he also was a trespasser in attaching the heifers. As the case is much involved, and the whole testimony furnished at the trial was very slender, we order the verdict to be set aside.”

Mr. Rand, the learned annotator of the Massachusetts Reports, remarks

able. It seems, in an action brought for the tort, the pawnee has a right to such deduction.¹

40. If there is any agreement between the parties as to the time or mode of sale, they will be bound thereby.²

41. A pledgee cannot sell till a demand, though the debt is payable immediately without demand, and though by the terms of the pledge he may sell at private or public sale without notice to the debtor.³

42. Where a thing pledged is wrongfully taken by a stranger, it has been held that the pawnee may recover from him its full value, although pledged to him for less; being answerable to the pledgor for the excess.⁴

43. If goods pledged are attached by a creditor of the pledgor, without paying or tendering the debt secured by the pledge according to (Mass.) Statute 1829, chap. 124; in a suit by the pledgee against the officer, the measure of damages is the value of the goods, not the amount of the debt.⁵

44. But it has been held that, in case of a pledge with power of sale after a certain time, the pledgee gains only a special property, and in a suit against a third person recovers only the amount of his debt.⁶

45. Where there is no agreement that the pledgee shall sell the

¹ *Ratcliffe v. Davis*, Yelv. 179; *Jarvis v. Rogers*, 15 Mass. 389.

² *Stevens v. Bell*, 6 Mass. 339.

³ *Wilson v. Little*, 2 Comst. 443.

⁴ *Lyle v. Barker*, 5 Binn. 457.

⁵ *Pomeroy v. Smith*, 17 Pick. 85.

⁶ *Brownell v. Hawkins*, 4 Barb. 491.

upon this case: — "There seems to be no reason why he might not lawfully have attached in this case, as well as in the case of a mortgage of real estate." And Judge Story, in noticing the case as one of the "few peculiarities in the local jurisprudence of Massachusetts," prefixes to it the qualification, "it seems to have been held," &c. Story, Bailm. 357, 358. See also *Taylor v. Cheever*, Law Rep., May, 1856, p. 47. In the subsequent case of *Swett v. Brown*, 5 Pick. 178, the less questionable rule was established, that if the pawnee causes the pawn itself to be attached in a suit for the debt, he thereby waives his lien as against another creditor of the debtor, who had previously summoned him by the trustee process. But an attachment of the pledge for other debts will not extinguish the lien, if the pledgee at the time notify the officer of his intention to the contrary, and require him to keep possession accordingly. *Townsend v. Newell*, 14 Pick. 332. See *Aven-dale v. Morgan*, 5 Sneed, 703.

property, he cannot be compelled to do it; and, until payment of his debt, he cannot be charged as trustee of the pledgor.¹

46. If one holding a pledge, to secure a debt due himself, and also a debt due another person, agree to dispose of it to the best advantage, and apply the proceeds to both debts, he has a right, in case the proceeds are insufficient to pay both, to pay his own first, and apply the balance to the other.²

47. In general, where one receives bonds and notes for collection, as collateral security, he is bound to use due diligence; otherwise, if they are lost through the insolvency of the parties, he is liable for their value.³

48. Pledge, as collateral security, of two notes, which the pledgee was to collect, and deduct his debt from the proceeds. The maker had abundant property, from which the notes might be collected, and the pledgee delayed enforcing them for five months, when the maker became insolvent; but not having been suspected of embarrassment, and the pledgor not having requested the holder to collect the notes, held, the latter was not chargeable with the amount of the notes.⁴

49. In general, a bill in equity does not lie for the redemption of a pledge, the pledgor having a perfect remedy at law. Otherwise, where an account or discovery is required, or the pledge has been assigned.⁵

50. In case of a wrongful sale of the pledge, the pledgor may sue without a tender of the debt.⁶ And a liberal valuation will be given to the property in his favor.

51. Certain stock being pledged to secure a debt, and wrongfully sold by the pledgee, the debtor offered to pay the debt, and requested a return of the stock. The pledgee promised to return it, or other shares of the same kind; the debtor waited from time to time for him to do so; and in the mean time the stock rose in value. Held, in an action for wrongfully selling the stock, the debtor might recover the increased value.⁷

52. In an action against the holder of a pledge by the owner to recover its value, the defendant may set off the debt secured thereby, though there have been a tender and refusal.⁸

¹ *Badlam v. Tucker*, 1 Pick. 389.

² *Marshall v. Bryant*, 12 Mass. 321.

³ *Noland v. Clark*, 10 B. Mon. 239.

⁴ *Goodall v. Richardson*, 14 N. H. 567.

⁵ *Jones v. Smith*, 2 Ves. 372, n.;

Doak v. Bank, &c., 6 Ired. 309.

⁶ *Wilson v. Little*, 2 Comst. 443.

⁷ *Ibid.*

⁸ *Jarvis v. Rogers*, 15 Mass. 389.

53. If a pledgee pledge the property, for a debt greater than the one for which he received it as security, the owner may redeem it from the second pledgee by paying the amount of his (the first pledgor's) debt.¹

54. The second pledgee may discharge himself, by delivering the pledge to his debtor, at any time before the owner offers to redeem it.²

55. Similar to a pledge of personal property, is that form of conditional transfer termed *hypothecation*; the chief characteristic of which seems to be, that the creditor does not, as in case of pledge, take possession of the property. Judge Story says:—"There are few cases, if any, in our law, where an hypothecation, in the strict sense of the Roman law, exists; that is a pledge without possession by the pledgee. The nearest approaches, perhaps, are the cases of holders of bottomry bonds, of material men, and of seamen for wages in the merchants' service, who have a claim against the ship, *in rem*. But these are rather cases of liens or privileges, than strict hypothecations."³

56. *Assumpsit*, for one quarter of the proceeds of sale of a ship and of her previous earnings. The plaintiff offered in proof of title a bill of sale of one quarter, from a party who with three others was the first owner. The defendant offered a paper, prior in execution to the plaintiff's purchase, from all the first owners, agreeing to "pledge" to the defendant the vessel, then being built, as security for his advances thereon, and to sell him any part of the vessel for so much per ton. The defendant afterwards sold her; but his advances exceeded the proceeds of sale and earnings. Held, the instrument last named was invalid against the plaintiff's title, being neither an absolute sale, a mortgage, nor a pledge.⁴ Parker, C. J., says:⁵—"The writing did not transfer the absolute title in the vessel, for that would have been contrary to the intention of the parties, nothing more being designed than a security for advances which the defendant might make towards the building and equipping the vessel; for in the same instrument provision is made for a future purchase, if the defendant should elect to buy any part, unless the owners should themselves dispose of her before. The instrument does not amount

¹ *Jarvis v. Rogers*, 15 Mass. 389.

² *Ibid.*

³ Story, *Bailm.* 292, § 288; 293, § 290; 298, § 294.

⁴ *Bonsey v. Amee*, 8 Pick. 236.

⁵ *Ib.* 237, 238.

to a mortgage, for it does not appear that there was any delivery of the vessel; and a delivery is necessary to constitute a mortgage of a chattel; besides, the vessel not being in existence as such, the instrument created only an executory contract, not a sale, conditional or absolute. Neither can it amount to a pledge, because to constitute this kind of contract there must be not only a delivery over, but a continued possession by the pledgee of the thing pledged; and as soon as the thing is restored, the pledge ceases to exist. Now it does not appear that there was any delivery over or possession of the vessel. The transaction has more analogy to a contract of bottomry, than to either species of contract mentioned. But it cannot avail in that form, because no ship was in existence when the contract was made, and the circumstances are not such as will justify a bottomry." (e)

57. But it has since been decided in the same State, that, although there cannot be a technical *pledge* of a chattel not in existence, there may be a *hypothecation*, by which a lien will arise as soon as the chattel is created.

58. By a contract between two lessees of a brickyard and a third person, it was agreed that the latter should make bricks in the yard, and pay the lessees at a certain rate for the clay, and that the lessees should buy wood, sell the bricks, &c.; that the profit or loss should be divided; and that the lessees might retain the bricks, to the extent of their advances from time to time to the manufacturer. Afterwards the manufacturer drew an order on them, to pay the payee what might be due from sales, after deducting their advances. Subsequently, the lessees assigned all their property to the plaintiffs, including their interest in this contract, and the plaintiffs went into the yard and notified the manufacturer of the assignment, and he assented to it, and agreed to act as agent for the plaintiffs, they agreeing to make advances as the lessees were to do under the contract. The plaintiffs took possession of the yard and property therein, and gave charge of it by writing to the manufacturer, directing him to sell the bricks by retail for cash, and, after receiving a certain sum, to deposit in a bank to the credit of the plaintiffs. A creditor of the manufacturer having attached the bricks, the plaintiffs replevy them from the

(e) Judge Story says, (Bailm. 292, n.) this case seems contrary to the current of authorities. See ch. 41, § 31.

officer. Held, the right of the lessees to retain the bricks, as security for their advances, was assignable, with the consent of the manufacturer; that the plaintiffs had a lien paramount to the attachment; and that the order above referred to was admissible in evidence, as tending to prove the original contract on the part of the manufacturer, by which the lessees were to retain his part of the bricks, as collateral security.¹ Putnam, J., says:² — “It was an agreement for the pledging of the bricks as they should be made. It is true that where the property is to be thereafter acquired, it is not strictly and technically a pledge; it is rather an hypothecation; but when the title is acquired *in futuro*, the right of the pledgee attaches immediately upon it. Every brick as it was formed may well be considered as delivered to the plaintiffs in part execution of the contract. The whole were put into kilns and burnt in the plaintiffs’ yard; for, as assignees of the lessees, they legally held the yard in their possession during the term.”

59. Notes were given at three months, secured by a hypothecation of stock, which the lender agreed to hold for that time. Held, the days of grace upon the notes did not apply to the pledge, but this might be sold before the notes became due. It was further held, that the sale must be made, not at the board of brokers, but at public auction, unless there were an agreement to the contrary; and having been made at the board, the pledgor was held entitled to the highest value of stock, being one per cent. more than the price paid, after the time of sale.³ (*f*)

¹ *Macomber v. Parker*, 14 Pick. 497. Court, Oct. 1851, Law Rep. Dec. 1851,

² *Ibid.* 505, 506. p. 449.

³ *McCullough v. Rankin*, N. Y. Sup.

(*f*) There are various topics in the law of pledges, which it is foreign from the plan of this work to consider; some of which are governed by the same rules already stated at length in regard to mortgages, and others are peculiar to the *pawn* or *pledge*, strictly so called, as a species of *bailement*. Such are the pawnee’s right to use the property; his responsibility for it, in case of injury or loss, involving the nice distinctions as to the degrees of care and diligence imposed upon bailees of different classes; his liability to render an account of the income and profits derived from the pledge, while in his possession, and his claim for any expenses necessarily incurred in keeping it; the effect of the lapse of time or the Statute of Limitations upon the respective rights of the parties; the construction given to an agreement, that the pledge shall be absolutely forfeited by failure to pay the debt at the

time appointed ; * and the right of creditors of the pawnor to levy upon the property pledged.

The consideration of the whole subject may be properly closed, with an extended citation of the most learned and elaborate judicial opinion in relation to the law of pawn or pledge, which is to be found in the English or American Reports. † This may properly be introduced by reference to the case of *Ratcliff v. Davis*, (Yelv. 178,) where it was held, that if goods are pawned, and no particular time of redemption fixed, the pawnor may redeem at any time during his life, notwithstanding the death of the pawnee. Also, that if the pawnee deliver the pledge to a third person, yet the tender for redemption must be made to the pawnee, or his representative if he be dead. Also, that after the pawnor's death his executors cannot redeem.

The American edition of Yelverton's Reports, annotated by Judge Metcalf, contains a valuable note to the case above cited, which also embodies the very learned decision of Chancellor Kent, above referred to, upon the same subject. The entire note is hereto subjoined. Yelv. 179, n. 1.

"The decision of the points, which arose out of the special verdict in the text, is conformable to the ancient law of pawns and to all the subsequent decisions, namely, that the tender was well made to the executor ; that the special property in the pledge, after the tender and refusal, reverted in the plaintiff ; that the general property had been constantly in him ; that the pawnee's death did not destroy the right of redemption ; that refusal by the defendant, after tender to the executor, was a conversion, and that the defendant had only the bare custody of the pawn. But the *obiter dicta*, which are ascribed to a majority of the Judges by Bulstrode, Noy, and Yelverton, in their respective reports of the case (contrary to Croke's statement) are not to be received as law.

"In the learned judgment given in the case of *Cortelyou v. Lansing*, *ubi sup.*, the subject is fully discussed. An abstract of the opinion given by Mr. Justice Kent, in that case, will illustrate a subject which was before involved in doubt and difficulty.

"There is a difference between a mortgage of goods, and a pledge, or pawn. A mortgage is an absolute pledge, to become an absolute interest, if not redeemed at a fixed time ; and is, in certain cases, valid without delivery. The legal property passes, with a condition of defeasance. A pledge or pawn of goods is a deposit of them as a security ; and delivery is essen-

* The pledgee cannot appropriate the property to himself upon the default of the pledgor, even though it should be so agreed between them ; for such an agreement, as in case of mortgages, is repudiated by the law, as unconscionable and against public policy. Story, Bailm. 317.

† "In the very able and learned examination of the rights and duties of a pawnee, in the case of *Cortelyou v. Lansing*, (2 Caines, Cas. in Er. 201,) most of the law on the subject of pledges has been collected." Per Thompson, C. J., *Garlick v. James*, 12 Johns. 149.

tial. The general property does not pass, as it does in case of a mortgage, but remains in the pawnor. Dig. lib. 13, tit. 7, sect. 9; 1 H. 291, sect. 15; Bracton, 99, b. Bro. Abr. Pledges, 20; Pow. on Mortg. 3; Jones v. Smith. 2 Ves. Jun. 378. The mortgage, and the pledge or pawn of goods, have, however, generally been confounded.

"Glanville observes, lib. 10, chap. 6, that a loan is sometimes made on the credit of a putting in pledge, and the pledge may consist of chattels, lands, or rents. Sometimes possession is immediately given of the pledge, on receipt of the loan, and sometimes it is not. Sometimes the thing is pledged for a certain period, and sometimes indefinitely. When a thing is pledged for a definite period, it is either agreed that if, at the time appointed, the debtor shall not redeem his pledge, it shall then belong to the creditor, so that he may dispose of it as his own; or no such agreement is made. In the former case, the agreement must be adhered to; in the latter, the term having expired without the debtor's discharging the debt, the creditor may complain of him, and the debtor shall be compelled to appear and answer in court, by a writ, (the form of which is given in chap. 7,) thus: 'Command N. that justly and without delay, he redeem such a thing, which he has pledged to R. for a hundred marks, for a term which is past, as he says, and of which he complains that he has not redeemed it; and unless he does so', &c. In chap. 8, he says, if the debtor confesses in Court that he pledged the thing in question for the debt, he shall be commanded at a reasonable period to redeem his pledge, and unless he comply, liberty shall be given to the creditor, from that time, to treat the pledge as his own property, and do whatever he chooses with it. If a thing be pledged indefinitely, and without any period being fixed, the creditor may, at any time he chooses, demand the debt. The debt being discharged by the person owing it, the creditor is bound to restore to him the thing pledged, without any deterioration. See Beame's translation of Glanville, 252-257; 1 Reeves Hist. 161-163. This authority establishes two points: 1st. That if the pledge was not redeemed by the time stipulated, it did not then become absolute property in the hands of the pawnee, but he was obliged to have recourse to the *aula regis*, and to sue out an original writ, in order to obtain authority to dispose of the pledge; 2d. That if the pledge was for an indefinite term, the creditor might at any time call upon the debtor to redeem, by the same process of demand. By what authority the Judges in the time of James I. advanced a different doctrine on the subject, is not made to appear.

"In the case in the text, it is said that if no time is limited for redemption, the pawnor has time to redeem it during his life; but if he die without redeeming, the right is gone, and his representatives cannot redeem. In Bulstrode's report of the case the only reason stated is, that it would be mischievous to compel the pawnee to keep the goods thus pawned, for such an indefinite time, when he has paid sufficiently for them. This objection would have been found to have no validity, if the Judges had attended to

the law as laid down by Glanville, who says the creditor may quicken his debtor's delay, and demand his debt at any time, by a process which he has stated. In Noy's report, as well as in the text, the reason stated is, that the pledge is a condition personal, and extends only to the person of him who pawned it. This ground of the opinion is equally unsound. A pledge is not a property created upon a condition of defeasance, like a mortgage. It has no analogy to the case of a right which is absolute, to vest or to be defeated on the happening of an event; nor is it susceptible of that strict construction, unless it be so modified by the express agreement of the parties. Least of all is it a condition personal, to be performed exclusively by the pawnor. There is nothing of this in the nature of the contract; and in most cases, as when the time of payment is mentioned, it is agreed that the right may remain perfect in the representatives of the parties. This notion of a pledge, resting on the performance of a condition to revest the right, as in the case of a mortgage, probably led to the decision in *Capper v. Dickinson*, 1 Rol. Rep. 315, that if goods pawned for a limited time are not redeemed at the day, they are forfeited, and may be sold at the will of the pawnee. This doctrine is also laid down in the office of executors. But this is contrary to the contract of pledge; is repugnant to the ancient law, and is contradicted by Baron Comyns, who is of himself a great authority. *Com. Dig. Mortgage by Pledge of Goods, B.* It is also contrary to the civil law, and to the law of France, Holland, and Scotland. *Hub.* vol. 3, 1072, sect. 6; 1 *Domat*, 362, sect. 9, 10; 2 *Ersk.* 455. An extra-judicial dictum of Lord Chief Justice Treby, 1 *Ld. Raym.* 434, and another of Lord Hardwicke, 1 *Ves.* 278, (and both supported only by the case in the text,) which go to show that the pawn is not redeemable after the pawnee's death, are the only remaining authorities on which the proposition has rested. In *Tucker v. Wilson*, 1 *P. W.* 261, and *Lockwood v. Ewer*, 2 *Atk.* 303, and *Kemp v. Westbrook*, 1 *Ves.* 278, it was said, that a pawnee of stock was not bound to bring a bill of foreclosure, and might sell without it. But in the two first cases, the stock had been, in the first instance, absolutely transferred to the mortgagee with a defeasance thereto, that the assignment should be void, or the stock retransferred on payment at the day. They were cases, therefore, not of a pledge, but of a mortgage of goods; and though it is nowhere stated, in what manner the mortgagee is to sell, yet in the first of these cases there was a previous notice to the opposite party, according to the rule of the civil law, and the giving of this notice was asserted to be the constant practice. The last case was strictly a pledge of chattels to secure a loan, without a specified time of payment; and *the assignee of the pawnor, who had become a bankrupt, was allowed to redeem.* *Demandray v. Metcalfe*, *Pre. Ch.* 420; 2 *Vern.* 691, 698; *Gilb. Eq. Rep.* 104; 1 *Eq. Cas. Abr.* 324; *S. C.* and *Vandersee v. Willis*, 3 *Bro. C. C.* 21, are cases of pledge, and perfectly in point. In the one case, there was a pawn of jewels, and in the other, of bonds and securities. In both cases, the time

of payment had elapsed in the lifetime of the pawnor ; but the executors, on a bill to redeem on payment of the debt and interest, obtained a decree accordingly. It is said, indeed, in the first case, that the executors could not have back the jewels, without the assistance of chancery. If by this was meant the identical chattel pawned, it was perhaps correct ; but if the observation meant that executors had no remedy but in equity, it must be a mistake ; for a court of law has complete jurisdiction over the subject, and is equally competent to grant relief where the right of property is not extinguished. It would be unreasonable to turn the plaintiff round to another forum, when there are no technical difficulties to impede, nor any defect of authority to give him redress at law, by restoring to him, if not the specific thing, yet its equivalent. If a court of law will permit one party to demand his debt after the time, it will permit the other party to tender and redeem. In the *South Sea Company v. Duncomb*, 2 Stra. 919, it was decided, that where the pawnor of stock did not pay at the day stipulated, the pawnee had his election to sue for the debt, or to *stand to his remedy against the pawn*. The Court did not state the remedy ; but still there was to be a remedy under the sanction of law ; and the only remedies hitherto suggested in the books, are the process by writ, as stated in Glanville, the bill of foreclosure, as hinted in other cases, and the sale by the pawnee, after notice, in cases of the transfer of stock, as seems to have been the practice. From this review of the cases, Kent, J., concludes, that whatever right to redeem existed in the pawnor at his death, that right descended entire and unimpaired to his representative, and the decision of the Court was made accordingly.

“ Kent, J., *ubi sup.* says the expression in the text, that the pawnee has his life, as a time to redeem, when no time of redemption is fixed, must be taken with this qualification, that the pawnee does not, in the mean time, call upon him to redeem. A sale, without such call and notice, was, in the case then before him, held to be a conversion. A similar decision has been made in Pennsylvania. *Brown's Rep.* 176, *De Lisle v. Priestman*. Except in cases of special agreement, the Roman law never allowed a pledge to be sold by the creditor, but upon notice to the debtor, and the allowance of a year's redemption. 1 Hub. 157, sect. 2 ; 3 Ib. 172, sect. 6 ; *Perezins on the Code*, vol. 2, tit. 34, sect. 4, 5. And as this was not sufficiently observed, Justinian regulated the method of foreclosure by a particular ordinance, by which two years' notice, or two years after a judicial sentence, was allowed to the debtor. See authorities cited by Kent, J., 2 *Caines*, Cas. in Er. 213.

“ The creditor may sue for his debt, and proceed in the same manner, as he might if no pledge had been made. But on payment of the debt, he must restore the pledge. *Glanville*, lib. 10, chap. 6 ; 12 *Mod.* 564 ; *Anon.* 2 Stra. *ubi sup.* ; 2 *Starkie's Rep.* 72 ; *Vin. Abr.* Pawns, acc. 8 *Mass.* 150, *Cleverly v. Brackett et al.*, *contra*.

APPENDIX No. II.

STATUTORY PROVISIONS IN RELATION TO MORTGAGES OF PERSONAL PROPERTY.

THE following are the statutes of the several States, relating to mortgages of personal property. Being mostly of recent enactment, and the subject itself being comparatively a new one, it seemed advisable to copy the several acts at length, with slight abbreviations, instead of presenting a mere summary or abstract of them, as was done in reference to mortgages of real estate. These statutes, it will be seen, chiefly pertain to delivery and possession, registration, foreclosure and redemption, and the seizure of mortgaged personal property upon legal process against the mortgagor. With a general similarity, the laws of the different States vary in many of their minute and detailed provisions. Possibly some enactments may have escaped notice.

Massachusetts Revised Statutes, p. 473, c. 74 : — (See Mass. Gen. Stats.)

Sect. 5. No mortgage of personal property, hereafter made, shall be valid against any other person than the parties thereto, unless possession be delivered to, and retained by, the mortgagee, or unless the mortgage be recorded by the clerk of the town where the mortgagor resides.

Sect. 6. Nothing contained in the preceding section shall avoid or

“That the executrix, in the case in the text, was entitled to recover the £25, notwithstanding the tender, seems very clear from the authorities, though the reporter thought it a strange doctrine.”

See further, in relation to pawn or pledge, *Dueli v. Cudlipp*, 1 Hilt. 166; *Parsons v. Overmire*, 22 Ill. 58; *Hilton v. Waring*, 7 Wis. 492; *Cater v. Merrell*, 14 La. An. 375; *Dix v. Tully*, 14 Ib. 456; *Depuy v. Clark*, 12 Ind. 427; *Culver v. Benedict*, 13 Gray, 7; *Roberts v. Sykes*, 30 Barb. 173; *Morris, &c. v. Lewis*, 1 Beasl. 323; *Dorch v. Frazier*, 1 Head, 243; *Bank, &c. v. Dubuque, &c.* 8 Clarke, 277; *Bodenhammer v. Newsom*, 5 Jones, 107; *Geffcken v. Slingerland*, 1 Bosw. 449; *Cardin v. Jones*, 23 Geo. 175; *Davey v. Bowman* 8 Cal. 145; *Wood v. Morgan*, 5 Sneed, 79; *Durfee v. McClurg*, 6 Mich. 223.

defeat any contract of bottomry, or respondentia, nor any transfer, assignment, or hypothecation of any ship or goods, at sea or abroad, if the mortgagee shall take possession of such ship or goods, as soon as may be after the arrival thereof within this State.

Sect. 7. The said clerk, upon payment of his fees, shall record all such mortgages, that shall be delivered to him, in a book to be kept for that purpose, noting in said book, and also on the mortgage, the time when the same is received; and every such mortgage shall be considered as recorded, at the time when it is left for that purpose in the clerk's office.

Massachusetts Statute, 1843, c. 72. Supplement, p. 262 : —

Sect. 2. Every mortgage of personal property, whenever the mortgagor shall retain possession, shall be recorded as well by the clerk of the town where the mortgagor resides, as by the clerk of the town in which he principally transacts his business, or follows his trade or calling.

Massachusetts Statute, 1851, p. 588, c. 57 : —

Sect. 1. It shall not be necessary to the validity of any mortgage, contract of bottomry, or respondentia, or any transfer, assignment, or hypothecation of any ship or vessel, that the same shall be recorded by any city or town clerk.

Massachusetts Revised Statutes, 556, c. 90 : —

Sect. 78. Any personal property of a debtor, subject to any mortgage, pledge, or lien, and of which the debtor has the right of redemption, may be attached and held, in like manner as if it were unincumbered, provided the attaching creditor shall pay or tender to the mortgagee, pawnee, or holder of the property, the amount for which it is so liable, within twenty-four hours after the same is demanded.

Sect. 79. Every such mortgagee, pawnee, or holder, shall, when demanding payment, state, in writing, a just and true account of his debt or demand and deliver it to the attaching creditor or officer; and if the sum is not paid or tendered to him within twenty-four hours thereafter, the attachment shall be dissolved, and the property shall be restored to him, and the attaching creditor shall moreover be liable to the mortgagee, &c., for any damages sustained by the attachment.

Sect. 80. If such mortgagee, &c., shall demand and receive more than the amount due to him, he shall be liable for the excess, with interest thereon, at the rate of twelve per cent. a year, to be recovered by the attaching creditor, in an action for money had and received.

Sect. 81. When any property, attached and redeemed, as afore-

said, shall be sold, either on mesne process or on execution, the proceeds thereof, after deducting the charges of the sale, shall be first applied to repay the attaching creditor the amount so paid by him, with lawful interest.

Sec. 82. If the plaintiff, after having redeemed the goods so attached, shall not recover judgment in the suit, he shall nevertheless be entitled to hold the goods, until the defendant shall repay to him the sum that he shall have paid for the redemption, or as much thereof as the defendant would have been obliged to pay to the mortgagee, &c., if they had not been attached, with interest from the time when the same shall be demanded of the defendant.

Massachusetts Revised Statutes, 646, c. 109 : —

Sect. 25. When goods, in the hands of any person summoned as a trustee, are mortgaged or pledged, or in any way liable, for the payment of any debt to him, the attaching creditor may be allowed, under an order of the Court, to pay or tender the amount due to the trustee, and the trustee shall thereupon deliver the goods to the officer who holds the execution.

Sect. 26. If the goods are held for any purpose, other than to secure the payment of money, and if the contract, condition, or other thing to be performed, is such as can be performed by the attaching creditor, without damage to the other parties, the Court may make an order for the performance thereof by him ; and, upon such performance, or a tender thereof, the trustee shall deliver the goods to the officer.

Sect. 27. All goods thus received by the officer shall be sold and disposed of as if they had been taken on an execution in the common form ; except that out of the proceeds of the sale, the officer shall repay the attaching creditor, with interest, or indemnify the creditor for such other act or thing as he shall have done or performed, for the redemption of the goods.

Sect. 28. Nothing contained in any of the preceding sections shall prevent the trustee from selling the goods for the payment of his demand, at any time before it shall be paid or tendered, provided such sale would be authorized by the terms of his contract.

Massachusetts Statute, 1844, c. 148. Supplement, 297, 298 : —

Sect. 1. The time within which an attaching creditor shall pay the sum due after demand by the mortgagee, &c., is hereby extended to ten days.

Sect. 2. Any personal property of a debtor, subject to a mortgage,

and being in the possession of the mortgagor, may be attached as if unincumbered, and the mortgagee, or his assigns, may be summoned in the action as trustee, to answer such questions as may be put to him or them, by the Court or their order, touching the consideration of the mortgage, and the amount due thereon.

Sect. 3. If, upon such examination, or verdict of a Jury, as hereinafter provided, it shall appear to the Court, before whom the action, on which the attachment is made, is brought, that the mortgage is *bonâ fide*, the Court, having first ascertained the amount that is justly due upon the mortgage, may direct the attaching creditor to pay the same to the mortgagee, or his assigns, within such time as they shall order; and if the attaching creditor shall not pay or tender to the mortgagee, or his assigns, the sum so directed by the Court to be paid, within the time prescribed, the attachment shall be void, and the property be restored to the mortgagee, or his assigns.

Sect. 4. If the attaching creditor shall deny the validity of a mortgage, and move that the same may be tried by a Jury, the Court shall order such trial on such issue as shall be framed therefor under the direction of the Court, and if, upon such examination or verdict, the mortgage shall be adjudged valid, the mortgagee, or his assigns, shall recover his costs.

Sect. 5. When the creditor shall have paid to the mortgagee, or his assigns, the sum directed by the Court, as aforesaid, he shall be entitled to retain out of the proceeds of the property attached, when sold, the sum so paid, with interest, and the balance, if any, shall be applied to the payment of his debt.

Sect. 6. If the attaching creditor, after having paid the sum directed by the Court, as aforesaid, shall not recover judgment in the suit, he shall, nevertheless, be entitled to hold the property until the debtor shall have repaid the sum so paid by order of Court, with interest.

Massachusetts Revised Statutes, 639, c. 107 : —

Sect. 40. When the condition of any mortgage of personal property has been broken, the mortgagor, or any person lawfully claiming or holding under him, may redeem the same at any time within sixty days thereafter, unless the property shall, in the mean time, have been sold, in pursuance of the contract between the parties.

Sect. 41. The person entitled to redeem shall pay or tender to the mortgagee, or to the person holding under him, the sum due on the mortgage, with all reasonable and lawful charges and expenses,

incurred in the care and custody of the property, or otherwise arising from the mortgage thereof; and if the property is not forthwith restored, the person entitled to redeem the same may recover it in an action of replevin, or may recover such damages as he may have sustained by the withholding thereof, in any action adapted to the circumstances of the case.

Massachusetts Statute, 1843, c. 72. Supplement, 262 : —

Sect. 1. In all mortgages of personal property, the right of the mortgagor or his assigns to such property shall not be forfeited, until sixty days after the mortgagee or his assigns shall have given written notice to the mortgagor or the person in possession of said property, claiming the same, of his or their intention to foreclose said mortgage, for a breach of the condition thereof, and caused a copy of the same notice to be recorded in the town clerk's office, where the mortgage is recorded.

Massachusetts Statute, 1850, 462, c. 284 : —

If any mortgagor of personal property shall sell or convey said property, or any part thereof, without the written consent of the mortgagee, and without informing the person, to whom he may sell or convey, that the same is mortgaged, said mortgagor shall be held guilty of a misdemeanor, and shall be punishable by a fine not exceeding one hundred dollars, or by imprisonment in the county jail or house of correction for a term not exceeding one year.

Massachusetts Statute, 1856, ch. 174 : —

In all mortgages of personal property, when the mortgagor shall have removed beyond the limits of this Commonwealth, and there shall be no attorney, assignee, or other legal representative of the mortgagor, and no person in possession of the property claiming the same, known to the mortgagee, upon whom notice of intention to foreclose can be served under the provisions of the seventy-second chapter of the acts of the year eighteen hundred and forty-three, the notice therein provided may be given by a publication of the notice at least once a week, for three several weeks, the first publication to be not less than sixty days previous to the foreclosure, and the last within one week of the time appointed therefor. The said publication to be made in one of the principal newspapers of the cities or towns where, by law, the said notice is to be recorded; and if there be no paper published in such cities or towns, then in one of the principal newspapers in the county or counties where such property is situated; and

to be also recorded in the city or town clerk's office, as provided in said statute.

Massachusetts Statutes, 1859, ch. 246, p. 409 : —

The mortgagor of personal property or any other person, fraudulently removing or concealing the property, or aiding or abetting therein, and any mortgagor assenting thereto, are made liable to fine or imprisonment.

In New Hampshire, by the Revised Statutes, 248, c. 133 : —

Sect. 1. Personal property, and crops of every description, whether the same have or have not come to maturity, are subject to mortgage, agreeably to the provisions of this chapter.

Sect. 2. Possession must be delivered to and retained by the mortgagee, or the mortgage must be recorded in the office of the clerk of the town in which the mortgagor resides at the time of making the same.

Sect. 3. Each mortgagor and mortgagee shall make and subscribe an affidavit in substance as follows : —

“ We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the condition thereof, and for no other purpose whatever, and that said debt was not created for the purpose of enabling the mortgagor to execute said mortgage, but is a just debt, honestly due and owing from the mortgagor to the mortgagee.”

Sect. 4. If such mortgage is given to indemnify the mortgagee against any liability assumed, or to secure the fulfilment of any agreement other than the payment of a debt, such liability or agreement shall be stated truly and specifically in the condition of the mortgage, and the affidavit shall be so far varied as to verify the validity, truth, and justice, of such liability or agreement.

Sect. 5. Every such affidavit, with the certificate of the Justice who administered the oath, shall be made upon or appended to such mortgage, and recorded therewith.

Sect. 6. All wilful falsehood committed in any such affidavit, shall be deemed to be perjury, and punished accordingly.

Sect. 7. No such mortgage shall be valid against any person except the mortgagor, his executors and administrators, unless possession is delivered or the mortgage is sworn to and recorded in the manner herein prescribed.

Sect. 8. No mortgagor of personal property shall sell or pledge any

such property, without the consent of the mortgagee in writing upon the back of the mortgage, and on the margin of the record thereof.

Sect. 9. No mortgagor shall execute any second or subsequent mortgage of personal property, while the same is subject to a previously existing mortgage given by such mortgagor, unless the existence of such previous mortgage is set forth in the subsequent mortgage.

Sect. 10. If any mortgagor shall be guilty of any offence against either of the two sections preceeding, he shall be punished by fine equal to double the value of the property so wrongfully sold, pledged, or mortgaged, one half to the use of the party injured, and the other half to the use of the county.

Sect. 11. Nothing in this chapter contained shall affect any transfer of the property under bottomry or respondentia bonds, or of any ships or goods at sea or abroad, if the mortgagee shall take possession thereof as soon as may be after their arrival in this State.

Sect. 12. Every town clerk shall keep a book of records for personal mortgages, at the expense of the town ; shall record therein any mortgage, transfer, consent, or discharge, or give a certified copy thereof, when requested, upon payment of the fees therefor ; shall certify the time when the same is received and recorded, and keep an alphabetical index of mortgagors and mortgagees, which records and index shall be open to public inspection.

Sect. 13. When the condition of any mortgage of personal property has been broken, the mortgagor may redeem the same by paying or tendering to the mortgagee the amount due on such mortgage, with all reasonable expenses incurred by reason of such breach of condition, at any time before a sale thereof as is hereinafter prescribed.

Sect. 14. The mortgagee may, at any time after thirty days from condition broken, sell the property or any part thereof, at auction ; notice of the time, place, and purposes of such sale being posted up at two or more public places in the town in which such sale is to be, four days, at least, prior thereto.

Sect. 15. The mortgagee shall notify the mortgagor of the time and place of sale, either by notice in writing delivered to the mortgagor, or if a corporation, to the person on whom legal process may be served, or left at his place of abode (if within the town), at least four days previous to the sale. If the mortgagor does not reside in the town, the posting up of notices, as required in the preceeding section, shall be sufficient.

Sect. 16. Such mortgagee may be a purchaser at such sale, and the proceeds of such sale shall be applied by him to the demand secured by such mortgage, and the expenses of keeping and sale ; and the residue, if any, shall be paid to the mortgagor on demand.

New Hampshire Statute, 1844, c. 141, 142, 143, 144 : —

Sect. 1. All provisions relating to the recording of mortgages of personal property in the several towns, are extended to, and shall be in force, in all unincorporated places, which are, or shall be required to pay any public tax ; and the clerks are required to record all such mortgages in the same manner with town clerks.

Sect. 2. Whenever no clerk is chosen, the same may be recorded by the town clerk of the town, or the clerk of the place adjoining said unincorporated place, paying the greatest proportion of the State tax, and it shall be the duty of such clerks so to record the same.

New Hampshire Statute, 1845, c. 235, p. 235 : —

Where co-partnerships are parties to mortgages of personal property, the affidavit required by the provisions of the chapter to which this act is in amendment, may be made and subscribed by any member in behalf of the firm.

New Hampshire Revised Statutes, c. 184, p. 369 : —

Sect. 15. Any personal property not exempt from attachment, subject to any mortgage, &c., may be attached as the property of a mortgagor, &c., the attaching creditor or officer paying or tendering to the mortgagee, &c., the amount for which said property is holden, as ascertained in the following mode.

Sect. 16. Such creditor or officer may demand of the mortgagee, &c., an account on oath of the amount due, and the officer may retain such property until the same is given, without tender or payment ; and if such account shall not be given within fifteen days after such demand, or if a false account is given, such property may be holden discharged from such mortgage, &c.

New Hampshire Statute, 1858, p. 2010 : —

When the mortgagor of personal property resides out of the State at the time of making of the mortgage, a record made in the office of the clerk of the town where the property is situated, shall have the same effect as the recording of such mortgage now has when the mortgagor resides in the State.

In Connecticut, by the Revised Statutes, pp. 408, 409 : —

Whenever the owner of any manufacturing or mechanical estab-

lishment shall mortgage the same for any debt or duty, and the mortgage shall convey the machinery, engines, or implements, situated and used in such establishment ; or whenever the owner of any dwelling-house, having a family, shall so mortgage the said dwelling-house, and the mortgage shall convey the household furniture belonging to the owner of said dwelling-house, and used by him therein in housekeeping ; or whenever the owner of any building in which hay is deposited shall so mortgage said building, and the mortgage shall convey said hay ; and the mortgage-deed shall contain a particular description of such property, and shall have the condition or defeasance within or upon the same ; then such mortgage shall hold such property, against subsequent purchasers or attaching creditors, as if the same were a part of the real estate, although the mortgagor shall retain possession ; and the mortgagee and mortgagor shall have the same remedies, and be subject to the same liabilities, as if such property were a part of the real estate.

Whenever the owner of any of the property above described shall mortgage the same, without the real estate ; for the security of any debt or duty, by a deed in which such property shall be particularly described, and which shall be executed, acknowledged, and recorded, as mortgages of lands are required to be ; such mortgage shall be effectual, although the mortgagor shall retain possession ; and if the mortgagor shall fail to perform the condition, the mortgagee may, according to the usual form of equity, bring his petition to the Court having jurisdiction within the county in which such manufacturing or mechanical establishment, dwelling-house, or building, is situated, for liberty to sell said property, to satisfy the debt ; and said Court may order the said property, or so much as may be necessary to satisfy said debt and the costs of prosecution, together with the fees and expenses of the sale, to be sold by some proper officer, in such manner and with such notice as said Court shall direct, unless the debt and costs shall be paid within such time as shall be limited by the Court ; and the officer's fees shall be the same as for levying upon and selling by virtue of an execution.

In Vermont, by the Revised Statutes, p. 317, c. 61 : —

Sect. 5. No mortgage of any machinery, used in any factory, shop, or mill, hereafter made, shall be valid against any other person than the parties thereto, unless possession of the machinery be delivered to, and retained by the mortgagee.

Sect. 1. Machinery attached to and used in any shop, mill, or factory, may be hereafter mortgaged by deed, executed, acknowledged, and recorded in the same manner as deeds of real estate.

Sect. 2. Mortgages of such machinery may be assigned, discharged, or foreclosed like mortgages of real estate.

Sect. 3. Section five of chapter sixty-four of the Compiled Statutes, and all other acts or parts of acts inconsistent with this act, are hereby repealed. Laws of Vermont, 1856, p. 22. The same provisions apply to machinery in printing offices. Acts of 1860, p. 16.

Laws of Vermont, 1856, p. 29 : —

Sect. 1. All mortgages of railroad franchises, furniture, cars, engines, and rolling stock of any kind, when properly executed and recorded, shall vest in the mortgagee a valid mortgage in and lien upon all such property, without delivery or change of possession ; and for the purpose of mortgage, all such property shall be deemed part of the realty.

Sect. 2. Nothing in this Act contained shall prevent such furniture, cars, engines, and rolling stock from being attached by any person having a claim against the corporation, for an injury sustained on the road, by reason of any neglect, or for services rendered, or materials furnished for the purpose of keeping said road in repair or in running the same, or for any liabilities as common carriers, or for the loss of any property while in the possession of said corporation ; and such property, when so attached, may be taken, held, and disposed of in the same manner as though this Act had not been passed.

In Maine, by the Revised Statutes, p. 558, c. 125 : —

Sect. 32. No mortgage of personal property, made since the twenty-fourth day of April, eighteen hundred and thirty-nine, or that shall be made hereafter, where the debt secured amounts to more than thirty dollars, shall be valid against any other persons than the parties, unless possession be delivered to, and retained by, the mortgagee ; or unless the mortgage has been, or shall be recorded by the clerk of the town where the mortgagor resides.

Sect. 33. The clerk on payment of his fees, shall record all such mortgages, that shall be delivered to him, in a book kept for that purpose, noting in the book, and on the mortgage, the time when the same was received ; and it shall be considered as recorded, when left with the clerk.

Sect. 34. Nothing in the two preceding sections shall avoid or

defeat any contract of bottomry, or respondentia, or transfer, assignment, or hypothecation of any ship or goods at sea or abroad, if the mortgagee shall take possession of such vessel or goods as soon as may be after the arrival of the same within the State.

Maine Statute, 1849, c. 103, p. 95:—

The 32d section of the one hundred and twenty-fifth chapter (of the Revised Statutes) is amended by adding after the word town, in the last line, “or plantation, though said plantation may be organized only for election purposes.”

Maine Statute, 1850, c. 180, p. 155:—

The 32nd section of the one hundred and twenty-fifth chapter of the Revised Statutes is hereby amended by adding at the end of said section the following words: “And if such mortgagor shall reside in any unincorporated place, the mortgage shall be recorded in that incorporated town which may be nearest (*a*) to the place where said mortgagor resides.”

Maine Statute, 1854, p. 114:—

In case of mortgage by a corporation, it shall be recorded in the town where such corporation has its established place of business.

Revised Statutes of Maine, p. 558, c. 125:—

Sect. 30. When the condition of any mortgage of personal property has been broken, the mortgagor, or any person lawfully claiming or holding under him, may redeem the same at any time within sixty days next after said breach, unless the property shall have been sold in the mean time, in pursuance of the contract between the parties or on execution for the debt of the mortgagor.

Sect. 31. The person entitled to redeem such property shall pay or tender to the mortgagee, or person holding under him, the sum due on the mortgage, with all reasonable and lawful charges incurred in the care and custody of the property or otherwise, arising from the mortgage itself; and, if such property is not immediately restored, the person entitled to redeem the same may recover it in an action of replevin; or he may recover such damages as he may have sustained by the withholding thereof, in an action of the case.

Revised Statutes of Maine, p. 521, c. 117:—

Sect. 38. When a creditor of a mortgagor or pledgor of any personal property, instead of summoning the mortgagee; &c., to answer to him in a process of foreign attachment, elects to attach the prop-

(*a*) The oldest adjoining town. Sts. 1854, 114.

erty, it may be lawful for him so to do, first paying or tendering to such mortgagee, &c., the full amount of the debt; and any such property, so redeemed, may be sold on execution, as any other personal property.

Sect. 39. The officer shall apply the proceeds of the sale, after deducting his fees and charges of sale, to the payment of the sum so paid or tendered to the mortgagee, &c., and interest; and the residue of such proceeds shall be applied to the judgment.

Sect. 40. Such plaintiff may have the same attached and seized, and sold on the execution, as in other cases, subject to the rights and interest of such mortgagee, &c., without paying or tendering payment of the debt.

Revised Statutes of Maine, p. 533, c. 119:—

Sect. 58. When any person, summoned as a trustee, shall, in his disclosure, state that he had, at the time the process was served on him, in his possession property not exempted by law from attachment, but that the same was mortgaged, pledged, or delivered to him by the principal defendant, to secure a money debt, and that the defendant has a subsisting right to redeem, the Court or Justice shall order and decree, that, on payment or tender of such money, by the plaintiff to said trustee, within such time as the Court shall order, and while the right of redemption exists, the person so summoned shall deliver over the property to the officer serving the process, to be held and disposed of in like manner, as if it had been attached on mesne process; and, in default thereof, that he shall be charged as trustee.

Sect. 59. On the return of the *scire facias* against such alleged trustee, if it shall appear that the plaintiff has complied with the order, and that such alleged trustee has refused or neglected to comply therewith, then the Court or Justice shall enter up judgment against him, for the sum due, and returned unsatisfied on the execution, if there should appear to be in his hands such an amount of the property mortgaged, over and above the sum received by such mortgagee or pledgee; but if not, then for the amount of said property, so exceeding the above sum, if any; which amount of excess shall, in the trial of the *scire facias*, be determined by the Court or Jury.

Sect. 60. Substantially the same provision as in section 58 is made, if, by the disclosure, it appear that the property was mortgaged, pledged, or subject to a lien to indemnify the trustee against any liability, or secure the performance of any contract or condition, and that the principal defendant has a subsisting right of redeeming.

Sect. 61. It shall be the duty of the officer, selling on execution any property delivered to him in virtue of this chapter, after deducting the fees and charges of sale, to pay the plaintiff the sum, by him paid or tendered to the trustee, or applied in the performance of the contract or condition, or discharge or extinguishment of the liability before mentioned, and interest to the time of such sale; and so much of the residue as may be required therefor, he shall apply in satisfaction of the judgment, according to law; and he shall pay over the balance, if any, to the debtor; the trustee to receive of the officer his costs, accruing before the service of the *seire facias*, as before provided in the sixteenth and seventeenth sections of this chapter.

Sect. 62. Nothing contained in this chapter shall prevent the trustee from selling the goods in his hands, for the payment of the sum for which they were mortgaged, &c., at any time before the amount due to him was paid or tendered, as before mentioned; provided such sale would be authorized by the terms of the contract between him and the principal defendant.

Revised Statutes of Maine, p. 506:—

Sect. 64. Personal property, not exempt from attachment, may be attached, held, and sold as if unincumbered, if the attaching creditor first tenders or pays to the mortgagee the full amount unpaid on demand.

Revised Statutes of Maine, 1857, 569:—

Sect. 1. No mortgage of personal property, for more than thirty dollars, shall be valid against any other person than the parties thereto, unless possession is delivered to and retained by the mortgagee, or the mortgage is recorded by the clerk of the town in which the mortgagor resides. (*b*)

When a corporation makes a mortgage, it shall be recorded in the town where it has its established place of business. When the mortgagor resides in an unincorporated place, the mortgage shall be recorded in the oldest adjoining town in the county.

Sect. 2. The clerk, on payment of the same fees allowed to registers of deeds for like services, shall record all such mortgages delivered to him in a book kept for that purpose, noting therein, and on the mortgage, the time when it was received; and it shall be considered as recorded when received.

(*b*) 19 Maine, 167; 22 Maine, 560; 24 Maine, 555; 25 Maine, 419; 31 Maine, 73; 32 Maine, 233; 34 Maine, 208; 37 Maine, 181, 543.

Sect. 3. The property may be redeemed by the mortgagor, or person claiming under him, within sixty days after breach of the condition, unless it has been sold by virtue of a contract, or on execution against the mortgagor. (c)

Sect. 4. To redeem, the sum due on the mortgage, with reasonable charges incurred, must be paid or tendered; and if the property is not immediately restored, it may be replevied; or damages for withholding it may be recovered in an action on the case.

Sect. 5. Nothing in the preceding sections shall defeat a contract of bottomry, respondentia, transfer, assignment, or hypothecation, of a vessel or goods at sea or abroad, if possession is taken as soon as may be after their arrival within the State.

Statute of Maine, 1859, p. 102 : —

If any person, claiming personal property by a mortgage, shall omit, for ten days after notice of an attachment given to him by the officer, to deliver to him a statement of the amount due on the mortgage, he shall be deemed to have waived his right to hold the property by virtue of such mortgage.

For a false statement of the amount due, he shall forfeit and pay to the creditor in the writ or execution double the amount of the excess.

In case of redemption of a mortgage of personal property, in behalf of a creditor attaching such property or seizing the same on execution, and a subsequent sale of the property, the officer shall first appropriate to the redeeming creditor from the proceeds the amount paid in redemption, with interest, if there be so much, and the residue, if any, as in other sales of goods attached or seized on execution.

The provisions of this act shall apply to all matters named in the sixty-fourth section of the eighty-first chapter of the revised statutes.

Statute of Maine, 1860, p. 143 : —

The notice and statement required by the act of 1859, shall be in writing.

Statute of Maine, 1861, p. 16 : —

When the condition of a mortgage of personal property for more than thirty dollars is broken, the mortgagor, or any person lawfully

(c) 21 Maine, 131; 29 Maine, 429; 31 Maine, 104, 501; 32 Maine, 174; 36 Maine, 17; 39 Maine, 448.

claiming under him, may redeem the same, at any time before the property is sold by virtue of a contract between the parties, or on execution against the mortgagor, or the right of redemption is foreclosed as hereinafter mentioned.

The person entitled to redeem shall pay or tender to the mortgagee, or person holding under him, by an assignment of the mortgage recorded where the mortgage is recorded, the sum due on the mortgage, or perform or offer performance of the thing to be done, with all reasonable charges incurred; and if the property is not immediately restored, it may be replevied, or damages for withholding it may be recovered in an action of the case.

The mortgagee or his assignee, after condition broken, may give to the mortgagor, or if the right of redemption of the mortgage has been assigned and the assignment recorded, to such assignee, written notice of his intention to foreclose for breach of condition; such notice shall be served by leaving a copy with the mortgagor or his assignee of record, or by publishing it once a week, for three successive weeks, in one of the principal newspapers published in the town or city where the mortgage is recorded; or, if the mortgagor or assignee is not a resident within the State, and there is no newspaper published in such town or city, in any newspaper printed in the county where the mortgage is recorded.

The notice, with an affidavit of service, or if published, a copy thereof, and the name and date of the paper in which it was last published, shall be recorded where the mortgage is recorded; and when so recorded, the copy of the record shall be evidence of such notice. If the mortgagee, or person claiming under him, is not a resident in the State, he shall at the time of recording such notice record therewith his appointment of an agent resident where the mortgage is recorded, to receive satisfaction of the mortgage, or the right to redeem shall not be forfeited. Payment or tender may be made to such agent.

If the money to be paid or other thing to be done is not paid or performed, or tender thereof made, within sixty days after such notice is recorded, the right to redeem shall be forfeited.

Nothing in the preceding sections, or in chapter 91 of the revised statutes, shall defeat a contract of bottomry, respondentia, transfer, assignment, or hypothecation of a vessel or goods at sea or abroad, if possession is taken as soon as may be after their arrival within the State.

Sections three, four, and five, of chapter 91 of the revised statutes are hereby repealed; the repeal thereof shall not affect any rights, remedies, or proceedings now existing by virtue thereof, or any mortgages executed before this act shall take effect.

In Rhode Island — Digest of 1844, p. 117 — (see *Earle v. Anthony*, 1 R. I. 310,) personal estate, when mortgaged and in the possession of the mortgagor, and while redeemable, may be attached on mesne process or execution against the mortgagor in the same manner as his other personal estate. By sect. 19 of the above statute, the plaintiff may redeem the mortgaged estate in the same manner as the mortgagor might have done, and in case of such redemption, shall have the same lien for the amount paid as the mortgagee had. By sect. 20, if the mortgage be not redeemed by the plaintiff (or sold, as provided by the act) before the time of redemption expires, the attachment shall become void.

Sect. 11. No mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession be delivered to and retained by the mortgagee; or unless the mortgage be recorded in the office of the clerk of the town where the mortgagor shall reside, if in this State, and if not, where the property is, at the time of making the same. Provided, that nothing herein contained shall affect any transfer of property under bottomry or respondentia bonds, or of any ship or goods at sea or abroad, if the mortgagee shall take possession thereof as soon as may be after the arrival of the same in this State.

Sect. 12. The town clerks shall record mortgages of personal property in a book, with the time when the same are received and recorded.

Sect. 13. When the condition of any mortgage of personal property has been broken, the mortgagor, or any person lawfully claiming or holding under him, may redeem the same at any time within sixty days thereafter, unless the property shall in the mean time have been sold, in pursuance of the contract between the parties.

Sect. 14. The person entitled to redeem shall pay or tender to the mortgagee, or to the person holding under him, the sum due on the mortgage, with all reasonable and lawful charges and expenses incurred in the care and custody of the property, or otherwise arising from the mortgage thereof; and if the property is not forthwith re-

stored, may recover it in an action of replevin, or damages, in any proper action.

Sect. 15. Any person entitled in equity to redeem any mortgaged property, whether real or personal, may prefer a bill to redeem the same to the supreme court in the county in which the real estate is situated, or in which the mortgagor of personal property may reside, if in this State; and if not, then in any county in this State; which bill may be heard, tried, and determined according to the usages in chancery, and the principles of equity. (See Revised Stat. of R. Island, 1857, p. 340.)

Personal estate, when mortgaged and in the possession of the mortgagor, and while redeemable at law or in equity, may be attached on mesne process against the mortgagor in the same manner as his other personal estate.

When attached, such mortgaged estate may be sold, upon the application of the mortgagee, or of either of the parties to the suit, in the manner provided for the sale of perishable goods and chattels, when attached.

Upon any such sale, the officer shall first apply the proceeds to the mortgage, with such deduction for interest, or allowance for damages, for the anticipated payment, as may be allowed by the court or judge directing the sale, and shall hold only the balance for the purposes of the attachment.

The plaintiff may redeem in the same manner as the mortgagor might have done; and shall then have the same lien on the property for the amount paid by him, with interest, as the mortgagee had.

If the mortgage be not redeemed by the plaintiff, or sold as before mentioned, before the time of redemption expires, the attachment shall become void. Revised Stat. of R. Island, 1857, p. 438.

Personal estate, when mortgaged and in the possession of the mortgagor, and while redeemable either at law or in equity, may be levied on by execution against the mortgagor, in the same manner as on his personal estate.

When levied on, whether by virtue of an attachment or otherwise, it shall be sold by the officer as in other cases of levies on personal property on executions.

The proceeds shall be applied to the mortgage, with such deduction for interest, or allowance for damages, as may be ascertained and allowed by the court to which the execution is returnable, and the balance shall be applied to the execution.

The plaintiff may redeem as the mortgagor might have done ; and upon such redemption shall have the same lien on the property for the amount paid by him, with interest, as the mortgagee had.

If the mortgage be not redeemed by the plaintiff, or sold as before mentioned, before the time of redemption expires, the attachment shall become void. Revised Stat. of R. Island, 1857, p. 474.

In New York, by the Revised Statutes (vol. 2, pp. 195, 196, 197.) c. 7. tit. 2. (d) :—

Sect. 5. Every sale made by a vendor, of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession, shall be presumed to be fraudulent and void, as against creditors, or subsequent purchasers in good faith ; and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers.

Sect. 6. The term “ creditors ” shall include all persons who shall be creditors at any time while such goods and chattels shall remain in his possession or under his control.

Sect. 7. Nothing contained in the two last sections shall be construed to apply to contracts of bottomry or respondentia, nor to assignments or hypothecations of vessels or goods, at sea or in foreign ports.

Sect. 9. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, shall be absolutely void as against creditors, and subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the succeeding section.

Sect. 10. The instruments mentioned in the preceding section shall be filed in the several towns and cities of this State, where the mortgagor, if a resident of this State, shall reside at the time of the execution thereof ; and if not a resident, then in the city or town

(d) See *Swift v. Hart*, 12 Barb. 530 ; *Fox v. Burns*, Ib. 677.

where the property shall be at the time of the execution of such instrument. In the city of New York, such instrument shall be filed in the office of the register of said city. In the other cities, and in the several towns in which a county clerk's office is kept, in such office; and in each of the other towns, in the office of the town clerk; and such register and clerks are hereby required to file all such instruments presented to them for that purpose, and to indorse thereon the time of receiving the same, and shall deposit the same in their respective offices, to be kept there for the inspection of all persons interested.

Sect. 11. Every mortgage filed in pursuance of this act shall cease to be valid as against creditors, or subsequent purchasers or mortgagees, in good faith, after the expiration of one year from the filing thereof; unless, within thirty days next preceeding the expiration of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property by virtue thereof, shall be again filed in the office of the clerk or register of the town or city where the mortgagor shall then reside.

Sect. 12. A copy of any such original instrument, or of any copy thereof, so filed as aforesaid, including any statement made in pursuance of this act, certified by the clerk or register, shall be received in evidence, but only of the fact that such instrument or copy, and statement, was received and filed according to the indorsement; and in all cases the original indorsement, made in pursuance of this act, shall be received in evidence only of the facts stated in such indorsement.

Sect. 13. The register of the city and county of New York, and the clerk of the city and county of Albany, shall respectively number every such instrument or copy which shall be filed in their offices, and shall enter in books to be provided by them, alphabetically, the names of all the parties, with the number indorsed thereon opposite to each name; which entry shall be repeated alphabetically under the name of every party thereto.

Sect. 15. The clerk of the county of Rensselaer shall, and he is hereby directed, at the expense of said county, to procure a book, in which he shall from time to time docket all mortgages of personal property filed in his office, in like manner as judgments are docketed.

In New York (Stat. 1848, c. 282) the 5th and 6th sections of chap. 279 of an act requiring mortgages of personal property to be filed.

and so forth, passed April 29, 1833, applicable to the city and county of New York, and the city and county of Albany, are hereby extended, and made applicable to the city of Rochester.

New York Statutes, 1849, c. 69, s. 1. It shall be the duty of the clerks of the several towns and counties of this State, in whose offices chattel mortgages are by law required to be filed, to provide proper books, at the expense of their respective towns, in which the names of all parties to every mortgage or instrument intended to operate as a mortgage of goods and chattels, hereafter filed by them or either of them, shall be entered in alphabetical order, under the head of mortgages, in each of such books respectively.

Sect. 2. It shall be the duty of the said several clerks to number every such mortgage or copy so filed in said office, by indorsing the number on the back thereof, and to enter such number in a separate column in the books in which such mortgages shall be entered, opposite to the name of every party thereto, also the date, the amount secured thereby, when due, and the date of the filing of every such mortgage. (*e*)

In Mississippi, (Hutch. Code of Miss. 605,) every deed respecting the title of personal property hereafter executed, which by law ought to be recorded, shall be recorded in the Court of that county in which such property shall remain; and if afterwards the person claiming title under such deed shall permit any other person in whose possession such property may be, to remove with the same, or any part thereof, out of the county in which such deed shall be recorded, and shall not, within twelve months after such removal, cause the deed aforesaid to be certified to the County Court of that county, into which such other person shall have so removed, and to be delivered to the clerk of such County Court, to be there recorded, such deed, for so long as it shall not be recorded in such last mentioned county, and for so much of the property aforesaid as shall have been so removed, shall be void in law as to all purchasers thereof for valuable consideration, without notice, and as to all creditors.

In Texas, (Hartl. Dig. p. 767, art. 2504,) all mortgages on negroes and other personal property shall be foreclosed in the following manner: Any person or persons holding a mortgage on personal property,

(*e*) See Pennsylvania Sts. 1854, 214.

and wishing to foreclose the same, shall make application to the Chief Justice of the county, and make affidavit before him of the amount of principal and interest due thereon, which affidavit shall be annexed to such mortgage, and thereupon the clerk of the County Court shall issue execution as in cases of judgment, which execution, being delivered to the sheriff, shall be levied upon the mortgaged property, and after being advertised for at least sixty days in some public gazette, shall be set up and sold to the highest bidder: *Provided always*, that if any disputes should arise as to the amount due on such mortgage, the Chief Justice of the County Court shall order the sale to be postponed upon the defendant's entering into bond and security in double the amount of the mortgage, for the delivery, to the sheriff, of the property so levied upon; and the same shall be returned to, and triable at the next term of the Court, as in other cases.

Art. 2506. The remedy to foreclose mortgages on personal property, shall remain and be as heretofore; and if there should be any dispute as to facts, the trial shall be subject to the same rules and regulations as by law govern the District Courts of this republic.

Art. 2508. If any person hath given, or shall give a mortgage or deed of trust upon any personal or movable property, and shall remove the same from the republic, or shall sell or otherwise dispose of the same within the limits of the republic, with intent to defraud the mortgagee, or person for whose benefit the deed of trust was given, such person so offending, shall be deemed guilty of grand larceny, and shall be punished accordingly.

Art. 2759, (p. 834.) All mortgages upon real estate, shall, upon the usual proof, be recorded in the county where the land is situated, within ninety days from the passage of this act (May 15, 1838,) or from the date of the execution of such mortgage; and upon personal property in the county where the mortgagor lives. No mortgage shall take lien upon property unless so recorded.

In the same State — Hartl. Dig. 835, Art. 2762 — (Act of Feb. 5, 1840;) all mortgages shall be recorded as heretofore, but the lien created by the making of the mortgage shall not be lost or destroyed, as between the parties to it, if the mortgagee should fail to have it recorded within the time prescribed by law.

In the same State, various other acts have been passed in relation to *registration*, but, as they have no special reference to mortgages of personal property, although these would seem to be included in their general language, they are not here inserted.

In Georgia, (Cobb's Dig. p. 571, art. 16, sec. 18,) mortgages of personal property shall be foreclosed in the following manner: Any person or persons holding a mortgage on personal property, and wishing to foreclose the same, shall make application to one of the Judges of the Superior, or Justices of the Inferior Courts, and make affidavit before him of the amount of principal and interest due on such mortgage, which affidavit shall be annexed to such mortgage, and thereupon the clerk of the Superior or Inferior Courts shall issue execution as on a judgment, which execution being delivered to the sheriff, it shall be his duty to levy on the property wheresoever the same may be found, and after advertising the same in one or more of the public gazettes of this State, at least sixty days, the sheriff shall set up and expose the same to sale, and the money arising from such sale shall be first applied to discharge the amount due on such mortgage, and all legal costs, and the overplus, if any, to be paid to the mortgagor: *Provided always*, that if any dispute shall happen as to the sum due on any mortgage, it shall and may be lawful for the said Judge or Justices of the Inferior Courts, on affidavit, to order such sale to be postponed, the mortgagor giving bond, with good and sufficient security in double the sum sworn to be due, for returning such property when called for by the sheriff, which bond shall be assignable by the sheriff to the mortgagee, who may sue and recover thereon; but the Jury shall be sworn to give at least twenty-five per cent. damages, in case it shall appear that such application was intended for delay only.

In Georgia, (Cobb's Dig. p. 572, sec. 1.) mortgages upon personal property may be foreclosed upon the affidavit of the agent or attorney, in fact or at law, of the person or persons holding such mortgage, as to the amount due.

Sect. 2. All such mortgages shall be foreclosed, and execution issue, in the county where the mortgagors resided at the time of the execution of the same, if residents of this State.

In the same State, (Cobb's Dig. p. 171,) by statute of 1827, all deeds of mortgage upon personal property which have been heretofore executed, shall be proved by the affidavit of the subscribing witness, and recorded in the clerk's office of the Superior Court of the county in which the mortgagor shall have resided at the time of the making of the same, or if he be dead, in the county where his legal representatives reside at the time of recording the same; or if there be no legal representatives in the county where the mortgagor

last resided previous to his death, within twelve months after the passage of this act: *Provided*, that nothing herein contained shall be so construed as to require mortgages which have already been recorded to be again recorded, but the same shall be held and deemed to be legally recorded, and admitted in evidence under the laws now in force in this State: *and provided also*, that if the witnesses to any mortgage are dead, or removed from the county, then the same may be recorded upon the affidavit of one or more persons who are acquainted with the handwriting.

Sect. 2. All deeds of mortgage upon personal property hereafter to be made, shall be proved in the same manner as is provided in the first section of this act for the proving of like deeds heretofore made, and shall be recorded in the clerk's office of the Superior Court of the county in which the mortgagor resided at the time of the execution of the said mortgage, within three months after the date of such mortgage.

Sect. 3. Every deed of conveyance or mortgage of either real or personal property hereafter to be made, may, upon being executed in the presence of, and attested by a Notary Public, Judge of the Superior Court, Justice of the Inferior Court, or Justice of the Peace, be admitted to record and made evidence in the different courts of law and equity in this State, as though the same had been executed, proved, and attested as heretofore required by the laws of this State in case of deeds of real property.

Sect. 4. Upon failure to record any mortgage, as hereinbefore required, within the time or times hereinbefore specified for recording the same, all judgments obtained before foreclosure, and also any mortgage executed after the same, and duly recorded, shall take lien in preference to the said mortgage.

Sect. 5. In cases of mortgages of personal property, executed when the property is beyond the limits of this State, and which property shall be afterward brought within the State, such mortgages shall be recorded within six months after said property shall be so brought in, in the office of the clerk of the Superior Court of the county where the person so bringing the said property shall first establish his residence.

Sect. 6. If the holder of any mortgage of property, so brought into the State, shall fail to record his mortgage at the place and within the time specified in the preceding section, for the recording the same; any and all judgments which shall have been duly obtained against

the mortgagor, before foreclosure, shall take lien prior to the mortgage: *Provided*, that if the mortgagee or his assignee, or the legal representatives of such mortgagee or assignee shall, on foreclosure, make affidavit before the Judge or Justice granting such foreclosure, that he was the holder of the mortgage at the time of the removal of the property into this State, and that he did not know, before the expiration of the time fixed as aforesaid for recording such mortgages, that the property had been removed within this State; or if the debt be not due, and the mortgagee, or his legal representatives or assignee, shall make a like affidavit before a Judge or Justice as aforesaid, and place the mortgage and affidavit together on record in the proper office hereinbefore specified; the mortgage shall be considered and taken from that time to have and be entitled to the same lien as if duly recorded.

In Georgia, numerous acts have been passed, relating to *registration*, but most of them apply equally to absolute sales and mortgages, and to real and personal property, and they are therefore here omitted.

In Alabama, (*f*) (Code of Ala. p. 279, c. 1): —

(*f*) In this State, with reference to the precise acts which are necessary to perfect a mortgagee's title by virtue of registration, it is said: "It was intended to give notice of the execution of the instrument. If the party in interest does all that he can to give such notice, especially if the act done be equivalent to the one required towards effecting that object, it would be wrong to injure him for the negligence of an officer who has been regularly appointed, according to the laws of the land, for the purpose of discharging this duty, and may, therefore, be viewed, in some measure, as chosen by the parties to the instrument legally deposited with him, for the especial purpose of putting them upon record. But, when an instrument is left with a clerk to be recorded, it probably has all the effect of notice that actually registering it affords. Persons who wish information on the subject, apply, of course, to the clerk, and it is presumable that he would give the information, as well with respect to such deeds as were in his office, but had not been, as those which had been, registered. If, however, it should appear that the mortgagee, &c., interfered, in any way, to prevent or postpone the recording of the deed, this would render the foregoing reasoning totally inapplicable to the case, and such deed would occupy the same situation that it would have done had it not been handed into the office. *McGregor v. Hall*, 3 St. & Por. 403, 404.

Sect. 1283. Conveyances of personal property, to secure debts or to provide indemnity, must be recorded in the county in which the grantor resides, and also in the county where the property is, at the date of the conveyance; and if, before the lien is satisfied, the property is removed to another county, the conveyance must be again recorded, within six months from such removal, in the county to which it is removed.

Sect. 1284. Whenever any personal property is subject to any lien, incumbrance, mortgage, or trust, for the security of debts, at the time of its removal to this State, the writing evidencing the lien, &c., must be recorded in the county in which it is brought, and remains, within four months of the arrival of such property.

Sect. 1286. Things in action, are not included in the words "personal property," in this article.

Sect. 1291. Conveyances of personal property to secure debts, or to provide indemnity, are inoperative against creditors and purchasers without notice, until recorded, unless the property is brought into this State, subject to such incumbrances, in which case four months are allowed for the registration of the conveyance; and if such property is removed to a different county from that in which the grantor resides, the conveyance must be recorded in such county, within six months from the removal, or it ceases to have effect after such six months, against the creditors or purchasers of the grantor, without notice.

Sect. 1292. The preceding section includes absolute conveyances of personal property, defeasible by a defeasance, or other instrument; and in such case, the defeasance must be recorded, according to the provisions of such section, or the same is void as to creditors and purchasers from the grantee, without notice.

The same Code (p. 321, c. 4) contains provisions relating to frauds and perjuries, but not peculiarly applicable to mortgages. (g)

† (g) A mortgage, founded on valuable consideration and *bonâ fide*, is not fraudulent *per se* under the Alabama statute of frauds, as to creditors not having actual notice of its existence, where the possession remains with the mortgagor more than twelve months. *Killough v. Steele*, 1 St. & Por. 262.

The terms "good consideration" in the third section of that statute — "this act shall not extend to any estate, &c., which shall be upon *good consideration* and *bonâ fide* lawfully conveyed," &c., mean *valuable* consideration. *Ibid.*

In Arkansas, (Dig. p. 745, c. 110,) the same provisions are made as to mortgages of real and of personal estate.

Ib. p. 340. c. 51, art. 5 : —

Sect. 1. Any person or persons who shall hereafter remove beyond the limits of this State, or of any county wherein the lien may be recorded, property of any kind upon which a lien shall exist by virtue of a mortgage, &c., as now prescribed by law, without the consent of the person or persons in whose favor such lien shall have been created, shall be liable to an indictment, &c.

Sect. 2. Also any person or persons who shall aid, abet, or assist in any manner such removal, &c.

In Virginia, by Stat. of 1819, c. 99, sect. 11, (1 Rev. Code, 364,) every deed respecting the title of personal chattels, hereafter executed, which by law ought to be recorded, shall be recorded in the Court of that county or corporation in which such property shall remain ; and if afterwards the person claiming title under such deed, shall permit any other person in whose possession such property may be, to remove with the same, or any part thereof, out of such county or corporation, and shall not, within twelve months after such removal, cause the deed to be certified to the Court of that county or corporation, into which such other person shall have so removed, and to be delivered to the clerk, to be there recorded, such deed, for so long as it shall not be recorded in such last-mentioned county or corporation Court, and for so much of the property aforesaid as shall have been so removed, shall be void in law, as to all purchasers for valuable consideration, without notice, and as to all creditors.

Sect. 12. All mortgages (shall take effect) when delivered to the clerk to be recorded, and all other conveyances, covenants, agreements, and deeds, which shall not be acknowledged, proved, or certified, and delivered to the clerk of the proper Court, to be recorded within eight months after the sealing and delivery thereof, shall take effect, and be valid as to all subsequent purchasers for valuable consideration, without notice, and as to all creditors, from the time when such deed of trust or mortgage, or such other conveyance, &c., shall have been so acknowledged, proved, or certified, and delivered to the clerk of the proper Court, to be recorded, and from that time only : *Provided, however,* that, if two or more deeds embracing the same property, after having been so acknowledged, proved, or certified, be delivered to the clerk, to be recorded on the same day, that which was first sealed and delivered shall have preference in law.

In the same State, by the Revised Code of 1849, various provisions are made in regard to transfers of real and personal property, but they have no special connection with mortgages, and therefore are not inserted.

In Florida, (Thompson's Dig. 376, c. 3) (*h*) : --

Sect. 1. All deeds of conveyance, bills of sale, or other instruments of writing, conveying, or selling property, either real, personal, or mixed, for the purpose or with the intention of securing the payment of money, whether running from the debtor to the creditor, or from the debtor to some third person or persons in trust for the creditor, shall be deemed and held as mortgages, and shall be subject to the same rules of foreclosure, to the same regulations and restrictions as now are, or may hereafter be, prescribed by law, in relation to mortgages.

Sect. 2 provides for the *assignment* of mortgages, including both real and personal property.

Sect. 3 provides for the foreclosure of mortgages of real and personal property.

Sect. 5. 1. Upon application of any person entitled to the foreclosure of a mortgage of slaves, or other personal property remaining in the possession of the mortgagor or mortgagors, for an attachment against the property mortgaged, it shall be the duty of the Judge of the Court, to which application for foreclosure shall be made, to direct a writ of attachment, which the clerk shall accordingly issue, directed to the ministerial or executive officer of the Court, commanding him to attach, levy upon, and take into possession and custody the property, or so much thereof as will satisfy the debt or demand, and the costs and charges; and the officer shall execute such writ without delay, and shall retain the property in his custody and possession, until judgment of foreclosure, when he shall dispose of it according to law, or until the further order of the Court, unless it shall be replevied in the manner hereinafter pointed out; but no such writ shall issue, unless the petitioner or petitioners for foreclosure, or any of them, or his, her, or their agent or attorney, shall make oath of the sum due upon the mortgage; and that he has reason to fear that the property will be concealed, so that the ordinary process of law cannot reach it, or that it will be removed beyond the jurisdiction of the

(*h*) See *Sanders v. Pepoon*, 4 Flori. 465.

Court ; and shall exhibit to the Judge the original mortgage, or any other evidence, or an acknowledgment of the debt or demand secured by it, which shall appear to have been given by the mortgagor or mortgagors at the time the application for such writ shall be made. The demand of the attachment, if made at the time of filing the petition for foreclosure, must be contained in the petition ; but the attachment may be applied for by petition, and obtained, on a compliance with the aforesaid requisitions, at any time before the judgment of foreclosure.

2. The mortgagor or mortgagors, or any other person or persons having an interest in the equity of redemption of any slave or other personal property which may be attached under the preceding section, may replevy the same by giving bond, with at least two good and sufficient securities, in a sum sufficient to cover the amount of the mortgage, payable to the ministerial officer of the Court to whom the writ shall have been directed ; and conditioned to return to the officer, or his successors, the said property, whenever the mortgage shall be foreclosed by the judgment of the Court, or to pay such sum as shall be adjudged due, and all the costs and charges, whenever demanded ; but no such replevy shall be made but upon the payment of all costs of issuing the attachment, and of the proceedings consequent thereon, and the bond so given on replevy, by the provisions of this section, shall have the force and effect of a judgment ; and nothing contained in this section shall release the property from the mortgage.

Sect. 6. Nothing in this act contained shall affect the jurisdiction of the Courts of Equity of this State in matters of mortgage.

In the same State, (Thomps. Dig. p. 380, c. 4) :—

Sect. 1. 1. If any mortgagor of personal property in this State, or other person, shall, with fraudulent intent make arrangements, endeavor or attempt to remove the same beyond the judicial circuit in which the property was at the time of the execution and delivery of the mortgage, so as to impair the rights, interest, or remedies of the mortgagee, or the assignee of such mortgagee, it shall be competent for the mortgagee, or any person interested in the mortgage, upon making an affidavit of the fact before a Judge of the Circuit Court, or before any Justice of the Peace, or the Clerk of the Circuit Court, to obtain a writ of attachment, to be directed to any constable or sheriff, requiring him to attach and take into his custody the property so removed, or attempted to be removed ; or if such constable or sheriff cannot be had, then any other indifferent person specially dele-

gated under the hand and seal of the Judge, Justice, or Clerk issuing such attachment.

2. Such writs shall run into any county. If the sum in controversy is \$50 or more, they shall be made returnable to the Circuit Court.

3. Such attachment thus applied for, shall not be issued till after the party applying shall have given bond, with two securities, in double the amount of the debt claimed, to be approved of by the Judge, Clerk, or Justice granting said attachment, to pay all damages the defendant may sustain, if the said attachment should be abated or dismissed for any cause whatever.

Sect. 2. 1. Upon application of the mortgagor or person interested in the mortgage, to the Judge of the circuit in which the writ of attachment was issued, it shall be his duty to order a *venire* to be issued, requiring the sheriff to summon a Jury to be impanelled before him, at such time and place as shall be specified in said writ, then and there to try and determine the following facts: *first*, whether the property attached was actually *bonâ fide* mortgaged; *second*, whether the mortgagor or other person claiming any interest in such property, or any person acting under his or their authority, or with his or their privity or consent, so fraudulently intended, had made arrangements, or endeavored or attempted to remove beyond the limits of the judicial circuit, the property so mortgaged, without the consent, or contrary to the wishes of the mortgagee, or other person interested in the said mortgage; and if the finding shall be in the affirmative, the Jury shall then proceed to ascertain the amount of the demand under the mortgage, and shall render a verdict for the same, whether the same be due or not; and judgment shall thereupon be entered up, and execution be issued and levied, as in other cases of execution.

Sect. 3 provides certain penalties for fraudulent removal of property mortgaged.

In the same State, (Thomps. Dig. p. 183, c. 1):—

Sect. 4. 1. Slaves shall be deemed, held, and taken as personal property for every purpose whatever.

2. No mortgage of personal property shall be effectual or valid to any purpose whatever, unless such mortgage shall be recorded in the office of records for the county in which the mortgaged property shall be at the time of the execution of the mortgage, unless the mortgaged property be delivered at the time of execution of the mortgage, or within twenty days thereafter, to the mortgagee, and shall continue to remain truly and *bonâ fide* in his possession; and mortgages of

personal property shall be admitted to record, upon proof of the execution thereof being made and exhibited to the recording officer, in any of the ways hereinbefore prescribed for proving the execution of conveyances, transfers, and mortgages of real property, or by proof being made upon oath by at least one credible person, before the recording officer, of the handwriting of the mortgagor or mortgagors, in cases in which there shall be no attesting witnesses to the mortgage.

In the same State, (Thomps. Dig. 355, c. 8):—

Sect. 2. 3. Equities of redemption, or the legal right of redemption in real and personal property, shall be subject to levy and sale, under executions, upon judgments at common law, or upon decrees in equity.

Sect. 4. Upon application made by the party causing the levy or levies, contemplated by the foregoing section to be made, the Courts respectively rendering such judgment, or granting such decree, shall cause the mortgagor or mortgagors, mortgagee or mortgagees, and all other persons who said mortgagor or mortgagors, mortgagee or mortgagees, or any or either of them, shall state upon oath to be interested in said mortgaged property, so levied upon, to come into Court and answer upon oath, what amount remains due and owing upon said mortgage, what amount has been paid, and to whom and when paid, that the value of said equity or legal right of redemption may be ascertained before the same shall be sold.

Sect. 5. It shall be the duty of the sheriff, &c., to require of the purchaser or purchasers of such equity or legal right of redemption in personal property, as he may levy upon and sell, a bond with two or more good and sufficient securities, for the payment of a sum in double the amount of the value of the personal property so levied upon and sold (which valuation it shall be the duty of the officer so selling to assess) to the mortgagee or mortgagees, his, her, or their heirs, executors, administrators or assigns, conditioned for the delivery of said property, on demand made by the proper officer of the Court, in which said judgment or decree of foreclosure may be rendered, and that said property shall not be removed beyond the limits of this State.

In South Carolina, (Stats. of S. C. 2, 587) (i):—

Sect. 15. In all bills of sale hereafter to be made of any negroes, plate, gold and silver, or goods and chattels whatsoever, by way of mortgage, with right of redemption upon performance of the proviso,

(i) See *Green v. Warrington*, 1 Desaus. 430.

and that the negroes, plate, gold and silver, or goods and chattels, are actually delivered, unto the person to whom such bill of sale is made, and are in his actual possession (and not a delivery or seizin in form of law only) and shall continue in the same for the space of two years after the breach of the proviso, without redemption thereof, the said goods and chattels so sold and delivered and possessed as aforesaid, though with right or equity of redemption, are hereby declared to be vested in the said person or persons to whom such bill of sale was made, &c.; excepting such person or persons having such right or equity of redemption be beyond the seas, or otherwise out of the limits of this Province, or a *feme covert*, all which persons shall have saved to them their equity of redemption, so as they prosecute the same within three years after the breach of the proviso of the bill of sale, and at no time after.

In North Carolina, (1 Rev. Stats. 231,) the same provisions are made as to the registration of mortgages of real and personal property. Ibid. p. 376, c. 65.

Sect. 19. Whenever any mortgagor or mortgagors in any mortgage of personal property, executed since the year one thousand eight hundred and thirty, or hereafter to be executed, or his, her, or their legal representative or representatives, shall fail to perform the conditions of the mortgage, for the space of two years from the time of performance specified in the mortgage, and shall omit to file a bill in equity, claiming the equitable right to redeem, for two years after the forfeiture of the conditions, he, she, or they shall be forever barred of all claim in equity to the property: *Provided, nevertheless*, that nothing herein contained shall prevent any mortgagee or mortgagees from filing a bill in equity, to foreclose any such mortgage, at any time after forfeiture of the conditions: *And provided further*, that if any such mortgagor or mortgagors shall become lunatic or *non compos mentis*, or removed beyond seas, he, she, or they shall be allowed the further time of one year from the removal of such disability, within which he, she, or they, or his, her, or their legal representative or representatives, may assert in equity his, her, or their right to redemption.

In Indiana, (*j*) by the Rev. Stats. p. 590, c. 33: —

(*j*) A mortgage may be acknowledged or proved before the recorder of the county. *Hamilton v. Mitchell*, 6 Blackf. 131.

Sect. 8. Every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless accompanied by an immediate delivery, and followed by an actual change of possession, shall be presumed to be fraudulent and void, as against creditors or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear that the same was made in good faith, and without any intent to defraud such creditors or purchasers.

Sect. 9. The term "creditors" includes all persons who shall be creditors of the vendor or assignor, at any time whilst such goods and chattels were in his possession or under his control.

Sect. 10. No assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, shall be valid against any other person than the parties thereto, where possession is not delivered and retained, unless such assignment shall be proved or acknowledged as provided in cases of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor or assignee resides, within ten days after the execution thereof.

Sect. 11. Every such assignment shall be considered as recorded from the time it shall be left at the proper recorder's office for that purpose.

Sect. 12. Nothing contained in the last preceding four sections shall avoid or defeat any contract of bottomry or respondentia, nor any transfer, assignment, or hypothecation of any ship, vessel, or goods aboard, if the mortgagee shall take possession as soon as may be, after arrival within the State.

(Subsequent sections of the same statute make provision against the fraudulent transfer of real and personal estate, but have no special connection with mortgages.)

In Illinois, (*k*) (Rev. Stats. c. 20, p. 91): —

Sect. 1. No mortgage on personal property shall be valid against any third person or persons, unless possession shall be delivered to, and remain with the mortgagee, or the mortgage be acknowledged and recorded, as hereinafter directed.

Sect. 2. Any mortgagor of personal property may acknowledge such mortgage before any Justice of the Peace in the Justice's district in which he may reside; and such Justice shall certify the same

(*k*) See *Cook v. Thayer*, 11 Ill. 617.

in substance as follows: "This mortgage was acknowledged before me, by A. B. (the mortgagor) this — day of —, 18—;" and the said Justice shall also keep on his docket a memorandum of the same, in substance as follows, namely: "A. B. to C. D., mortgage of, (here describe the property,) acknowledged this — day of —, 18—," inserting the name of the mortgagor in place of A. B.; and the name of the mortgagee in place of C. D.

Sect. 3. Any mortgage of personal property, so certified, shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the same is made, acknowledged, and recorded; and shall thereupon, *bonâ fide*, be good and valid from the time it is so recorded, for a space of time not exceeding two years, notwithstanding the property may be left in possession of the mortgagor: *Provided*, that such conveyance shall provide for the possession of the property so to remain with the mortgagor.

Sect. 4. A copy of any such mortgage, made, acknowledged, and recorded as aforesaid, certified by the proper recorder from the proper record, may be read in evidence in any court of this State, without further proof of the execution of its original, if said original be lost or out of the power of the person wishing to use it.

Sect. 6. Any person having conveyed any article of personal property to another by mortgage, who shall, during the existence of the lien or title created by such mortgage, sell the said personal property to a third person, for a valuable consideration, without informing him of the existence and effect of such mortgage, shall forfeit and pay to such purchaser, twice the value of such property so sold; which forfeiture may be recovered in an action of debt in any court having jurisdiction thereof, or if the amount claimed does not exceed one hundred dollars, before any Justice of the Peace.

Sect. 7. The provisions of this chapter shall be deemed to extend to all such bills of sale, deeds of trust, and other conveyances of personal property, as shall have the effect of a mortgage or lien upon such property.

In Kentucky, (*l*) by Stats. of 1851-52, p. 113, art. 15:—

(*l*) In Kentucky, an act of 1820 requires mortgage deeds to be deposited for record in the proper county within sixty days. By a subsequent statute, (August 1, 1839,) a mortgage does not take effect till it is actually lodged with the proper clerk, to be recorded. *Lobban v. Garrett*, 9 Dana, 389, 390; *Miles v. Blanton*, 3 Dana, 525; Rev. Sts. 327.

Sect. 1. When the defendant in an execution shall have owned the legal title in any real or personal estate, and have created a *bonâ fide* incumbrance thereon, by mortgage, &c., before an execution has created a lien on the same, the interest of the defendant in such property may be levied on and sold, subject to such incumbrance.

1. The purchaser at the sale shall acquire a lien on such property for the purchase-money, and interest after the rate of ten per centum per annum from the day of sale until paid, subject to the prior incumbrances.

2. Any other creditor, whether by judgment or not, may, after such execution and sale, by equitable proceeding subject the incumbered property to sale, and, after satisfying prior liens, have his demand satisfied out of the proceeds of the residue. The proceedings in equity must be instituted before the purchaser has, by suit, removed the incumbrance.

3. The defendant in the execution may redeem the property so sold by paying the original incumbrance, with legal interest thereon, and by paying the purchaser his purchase-money, with ten per centum per annum interest thereon.

4. The purchaser of incumbered movable property must, before possession thereof is delivered to him, give an obligation, with good surety, payable to the incumbrancer and the owner, stipulating that the property shall not be removed out of the county, and shall be preserved and forthcoming, unavoidable accidents excepted, to answer the incumbrance, and for redemption, and deliver the obligation to the officer, to be returned with the execution.

5. Courts of equity shall have the control of all incumbered property sold under execution, and the power to make all needful orders for the preservation and forthcoming of the property, and its issues and profits, to satisfy the incumbrance, and to secure the rights of others.

In the same State, (by Stat. 1836-37, c. 379,) mortgages of equitable titles to real or personal property must be recorded.

In Tennessee, (*m*) (Stat. Laws, 497, 1715, c. 38,) provision is made for redemption by a subsequent mortgagee of a prior mortgage of

(*m*) In this State, it is said, mortgages of personal property are to be proved and recorded like mortgages of real estate, as against *bonâ fide* creditors and purchasers. 2 Kent, 531, n.

real or personal property. Also for the mode of enforcing mortgages.

In Ohio, (Laws, 1845-46, p. 61) (*n*) : —

Sect. 1. Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, shall be absolutely void, as against creditors and subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be forthwith deposited as directed in the succeeding section of this act.

Sect. 2. The instruments mentioned in the preceding section, shall be deposited with the clerk of the township in this State, where the mortgagor therein, if a resident of this State, shall reside at the time of the execution thereof; and if not a resident, then with the clerk of the township where the property so mortgaged shall be at the time of the execution of such instrument.

Sect. 3. Upon receipt of any such instrument, the clerk receiving it shall file the same, and indorse thereon the time of receiving it, and shall deposit the same in his office, to be kept there for the inspection of all persons interested.

Sect. 4. Every mortgage, so filed, shall be void, as against creditors, or subsequent purchasers or mortgagees in good faith, after one year from the filing thereof, unless, within thirty days next preceding the expiration of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property at the time last aforesaid claimed by virtue of such mortgage, shall be again filed in the office of the clerk of the township where the mortgagor shall then reside, if in this State; and if his residence shall not be in this State, then in the office of the clerk of the township in which such property shall then be.

Sect. 5. A copy of any such original instrument, or of any copy thereof, so filed as aforesaid, including any statement made in pursuance of this act, certified by the clerk in whose office the same shall be filed, shall be received in evidence, but only of the fact that such instrument or copy, and such statement, was received and filed according to the indorsement of the clerk thereon, and of no other fact; and, in all cases, the original indorsement by the clerk, made in pursuance

(*n*) See *Wilson v. Leslie*, 20 Ohio, 161.

of this act, upon such instrument or copy, shall be received in evidence only of the facts stated in such indorsement.

Sect. 7. In all townships in which the office of the recorder of the county is kept, such instrument shall be deposited with him, and he shall perform the duties imposed upon and be entitled to the fees provided for township clerks in this act, and his certificate shall have the same force in evidence, &c.

In Michigan, (Rev. Stats. p. 327, c. 81, §§ 7, 8,) the same provisions are made as in Indiana, with regard to fraudulent mortgages.

Sect. 9. Nothing contained in the two last sections shall avoid or defeat any contract of bottomry or respondentia, nor any transfer, assignment, or hypothecation of any vessels or goods, at sea or abroad, if the assignee or mortgagee shall take possession as soon as may be after the arrival thereof.

Sect. 10. Every mortgage or conveyance intended to operate as a mortgage, of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession, shall be absolutely void as against creditors, and subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the township clerk of the township where the mortgagor resides.

Sect. 11. It shall be the duty of the township clerk, upon the presentation of any such instrument or copy for that purpose, and the payment of his fees, to indorse thereon the time of receiving the same, and to deposit such instrument or copy in his office, to be kept for the inspection of all persons interested.

Sect. 12. Such township clerk shall also enter in a book to be provided by him for that purpose, the names of all the parties to such instruments, arranging the names of the mortgagors alphabetically, and shall note therein the time of filing each instrument or copy.

Sect. 13. Every such mortgage shall cease to be valid as against creditors, or subsequent purchasers or mortgagees in good faith, after one year from the filing of the same or a copy thereof, unless within thirty days next preceding the expiration of the year, the mortgagee, his agent or attorney, shall make and annex to the instrument or copy on file as aforesaid, an affidavit, setting forth the interest which the mortgagee has by virtue of such mortgage, in the property therein

mentioned, upon which affidavit the township clerk shall indorse the time when the same was filed.

Sect. 14. The effect of any such affidavit shall not continue beyond one year from the time when such mortgage would otherwise cease to be valid, as against subsequent purchasers or mortgagees in good faith; but within thirty days next preceding the time when any such mortgage would otherwise cease to be valid as aforesaid, a similar affidavit may be filed and annexed as provided in the preceding section, and with the like effect.

Sect. 15. A copy of any such instrument, or of any copy thereof, so filed as aforesaid, including any affidavits annexed thereto in pursuance of this chapter, certified by the township clerk, in whose office the same shall be filed, shall be received in evidence, but only of the fact that such instrument, copy, or affidavit was received and filed, according to the indorsement of the township clerk thereon, and of no other fact.

In Missouri, (Rev. Stats. p. 752, c. 122) :—

Sect. 21. In all mortgages in which personal estate, other than slaves only, is conveyed, and the debt, exclusive of interest, secured by the same, shall not exceed one hundred dollars, it shall and may be lawful for the mortgagee, or his personal representatives, upon default in payment, to sell the property, or so much thereof as will satisfy his debt, giving the mortgagor sixty days' previous notice, in writing, that the property will be sold, unless the debt is paid, and giving thirty days' notice of the time and place of sale; the notice to be published in the same manner as a sheriff's notice of the sale of real estate; in all other mortgages of personal estate, no sale of such property shall be made by the mortgagee, but by foreclosure and sale, as in mortgages of real estate.

Ibid. p. 749. The same provisions are made for foreclosure of real and personal property.

Ibid. p. 527, c. 67.

Sect. 8. No mortgage of personal property hereafter made, shall be valid against any other person than the parties thereto, unless possession of the property shall be delivered to, and retained by, the mortgagee, or unless the mortgage be acknowledged, or proved and recorded in the county in which the mortgagor resides, in such manner as conveyances of lands are by law directed to be acknowledged, or proved and recorded.

Sect. 9. Nothing contained in the preceding section shall avoid or defeat any contract of bottomry, respondentia, nor any transfer or assignment or hypothecation of any boat, vessel, ship, or goods, at sea or abroad, if the mortgagee, trustee, or *cestui que trust* shall take possession as soon as may be after the arrival thereof within this State.

In Wisconsin, by the Revised Statutes, (p. 254, c. 38) :—

Sect. 3. Any mortgage of personal property, or a copy thereof, may be filed in the office of the clerk of any town or city where the mortgagor resides ; or, in case he is a non-resident of the State, then in the office of the clerk of the town or city where the property may be at the time of executing such mortgage ; and such clerk shall indorse on such instrument or copy, the time of receiving the same, and shall keep the same in his office for the inspection of all persons ; and such mortgages, so filed, shall be as valid as if the same had been recorded in the office of the register of deeds.

Sect. 4. Such clerk shall also enter in a book to be provided by him for that purpose, the names of all the parties to such instruments, arranging the names of the mortgagors alphabetically, and shall note therein the time of filing each instrument or copy.

Sect. 5. Every such mortgage shall cease to be valid as against creditors, or subsequent purchasers or mortgagees in good faith, after one year from the filing the same or a copy thereof, unless within thirty days next preceding the expiration of the year, the mortgagee, his agent, or attorney, shall make and annex to the instrument or copy on file as aforesaid, an affidavit, setting forth the interest which the mortgagee has by virtue of such mortgage in the property within mentioned, upon which affidavit the clerk shall indorse the time when the same was filed.

Sect. 6. The effect of any such affidavit shall not continue beyond one year from the time when such mortgage would otherwise cease to be valid, as against subsequent purchasers or mortgagees in good faith ; but within thirty days next preceding the time when any such mortgage would otherwise cease to be valid as aforesaid, a similar affidavit may be filed and annexed, as provided in the preceding section, and with the like effect.

Sect. 7. A copy of any such instrument, or of any copy thereof, so filed as aforesaid, including any affidavits annexed thereto in pursuance of this chapter, certified by the clerk in whose office the same shall be filed, shall be received in evidence, but only of the fact that

such instrument, copy, or affidavit, was received and filed, according to the indorsement of the clerk thereon, and of no other fact.

In the same State, (Rev. Stats. p. 389, c. 76) : —

Sect. 9. No mortgage of personal property hereafter made shall be valid against any other persons than the parties thereto, unless possession be delivered to, and retained by the mortgagee, or unless the mortgage be filed in the office of the town clerk where the mortgagor resides ; or in case he does not reside in the State, in the town where the property mortgaged may be at the time of executing the same ; and such clerk shall indorse thereon the time of receiving the same.

In Minnesota, (Minn. Stats. 141, c. 27) : —

Sect. 3. Any mortgage of personal property, or a copy thereof, may be filed in the office of the register of deeds of any county where the mortgagor resides, or, in case he is a non-resident of the territory, then in the office of the register of the county where the property mortgaged may be, at the time of executing such mortgage ; and such register shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons ; and such mortgages so filed, shall be as valid as if the same had been recorded in the office of the register of deeds.

Sect. 4, as in Michigan, s. 12.

Sect. 5. A copy of any such instrument, or of any copy thereof, so filed as aforesaid in pursuance of this chapter, certified by the register of deeds, in whose office the same shall be filed, shall be received in evidence, but only of the fact that such instrument or copy was received and filed according to the indorsement of the register thereon, and of no other fact.

In Iowa, (Code, p. 189, c. 76) : —

Sect. 1193. No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of deeds of the county where the holder of the property resides.

Sect. 1194. The recorder of deeds must keep an entry book or index for instruments of the above description, having the pages thereof ruled, so as to show in parallel columns, to be alphabetically

arranged in double entry, in the manner hereinafter provided, in case of deeds of personal property: —

First — The mortgagors or vendors;

Second — The mortgagees or vendees;

Third — The date of the filing of the instrument;

Fourth — The date of the instrument itself;

Fifth — Its nature;

Sixth — The page and book where the record is to be found.

Sect. 1195. Whenever any written instrument of the character above contemplated is filed for record as aforesaid, the recorder shall note thereon the day and hour of filing the same, and forthwith enter, in his entry book, all the particulars required in the preceding section, except the sixth item therein, and from the time of said entry, and not before, shall the sale or mortgage be deemed complete as to third persons, and shall have the same effect as though it had been accompanied by the actual delivery of the property so sold or mortgaged.

Sect. 1196. The recorder shall, as soon as practicable, record such instrument, and enter in his entry book, in its proper place, the page and book where the record may be found.

Any mortgage of personal property to secure the payment of money only, and where the time of payment is therein fixed, may be foreclosed by notice and sale, unless there be a stipulation to the contrary.

The notice must contain a full description of the property, together with the time, place, and terms of sale.

Such notice must be served on the mortgagor, and upon all persons having recorded liens upon the property, which are junior to the mortgage, or they will not be bound by the proceedings.

The service and return must be made in the same manner as in case of the original notice by which civil actions are commenced, except that no publication in the newspapers is necessary for this purpose, except the general publication directed in the next section.

After notice has been served upon the parties, it must be published in the same manner and for the same length of time, as is required in cases of the sale of like property on execution, and the sale shall be conducted in the same manner.

The purchaser shall take all the title and interest on which the mortgage operated as a lien.

The sheriff shall execute to the purchaser a bill of sale, which shall carry the whole title and interest purchased.

Evidence of the service and publication of the notice aforesaid, and of the sale made in accordance therewith, together with any postponement or other material matter, may be perpetuated by proper affidavits.

Such affidavits shall be attached to the bill of sale, and shall then be receivable in evidence.

Such sales shall be valid in the hands of a *bonâ fide* purchaser, whatever may be the equities between the mortgagor and mortgagee.

The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any one interested, and the proceeding may be transferred to the district court, for which purpose an injunction may issue, if necessary. Revised Laws of Iowa, 1860, p. 651.

In California, no mortgage of personal property shall be valid against any other persons than the parties thereto, unless possession be delivered to and retained by the mortgagee.

This provision does not apply to contracts of bottomry, respondentia, nor assignments or hypothecations of vessels or goods at sea, or in foreign States, or without the State; provided, the assignee or mortgagee shall take possession of such vessel or goods as soon as may be after the arrival thereof within the State. Stat. Cal., 1850, chap. 2.

A mortgage for a good and valuable consideration upon possessory claims to public lands, all buildings and improvements upon such lands, all quarter claims, and all other such personal property as shall be fixed in its structure to the soil, acknowledged in manner and form as mortgages upon real estate are required by law to be acknowledged, and recorded in the office of the recorder of the county in which the property is situated, shall have the same effect against third persons as mortgages upon real property.

The act of 1850, in so far as the same conflicts with the provisions of this act, is hereby repealed. Stat. Cal., 1853, ch. 193.

By a later act, the property is specified upon which mortgages may be made.

All mortgages are to be recorded in the county where the mortgagor lives, and also in the county where the property is located; unless the mortgagee receives and retains actual possession.

The right of redemption remains in the mortgagor, until foreclosed by due process of law, or by agreement between the parties entered upon the record.

Mortgaged property is made liable to attachment. Acts of California, 1857, p. 347.

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